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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

C. P. POMEROY,
REPORTER.

H. L. GEAR,
ASSISTANT REPORTER.

VOLUME 13.

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FIRST APPELLATE DISTRICT.

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THOS. J. LENNON, Presiding Justice.²

SAMUEL P. HALL, Associate Justice.

FRANK H. KERRIGAN, Associate Justice.

SECOND APPELLATE DISTRICT.

MATTHEW T. ALLEN, Presiding Justice.

JAMES W. TAGGART, Associate Justice.³

W. P. JAMES, Associate Justice.⁴

VICTOR E. SHAW, Associate Justice.

THIRD APPELLATE DISTRICT.

N. P. CHIPMAN, Presiding Justice.

ELIJAH C. HART, Associate Justice.

ALBERT G. BURNETT, Associate Justice.

¹ Term expired, January 2, 1911.

² Elected, November 8, 1910.

³ Died, July 13, 1910.

⁴ Appointed, July 26, 1910.

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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

[Civ. No. 710. Second Appellate District.—March 10, 1910.]

SAN PEDRO SALT COMPANY, a Corporation, Respondent, v. HAUSER PACKING COMPANY, a Corporation, Appellant.

CONTRACT TO FURNISH SALT ONE YEAR AT FIXED PRICE—OPTION TO RENEW—NOTICE AFTER YEAR INEFFECTIVE—REASONABLE VALUE.— Under a contract by which plaintiff agreed to furnish salt to defendant for one year at a fixed price, with the option to defendant to renew the contract for another year at the same rate, where the exercise of such option was delayed until thirty days after the expiration of the year, its exercise at that time was not effective; and notwithstanding such notice then given, plaintiff may recover the reasonable value of all salt thereafter furnished by plaintiff to defendant at its request, without regard to the original contract rate.

ID.—TIME FOR OPTION TO RENEW NOT STIPULATED.—Where a contract provides for its renewal at the option of a party thereto, without fixing the time when such option shall be exercised, the time for giving notice of such renewal cannot be extended beyond the date of the expiration of the contract.

ID.—RIGHTS CEASING WITH CONTRACT.—The right to renew, like other rights, must necessarily cease when there is no longer a contract under and by virtue of which to claim the privilege.

ID.—INVOICES OF SALT AT INCREASED PRICE—DISCLAIMER OF RENEWAL. Where all of the invoices of salt furnished by plaintiff to defendant after the expiration of the year, showed shipment at a greater price than that stipulated under the contract, they show that the plaintiff at all times disclaimed any renewal by defendant of the

contract, and afford ample evidence to defendant that plaintiff was furnishing salt only at the increased price.

APPEAL from an order of the Superior Court of Los Angeles County, denying a new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Isidore B. Dockweiler, for Appellant.

B. W. Hahn, and Hahn & Hahn, for Respondent.

SHAW, J.—On August 26, 1905, plaintiff contracted in writing to deliver to defendant during the ensuing year two hundred tons of salt at the price of \$5 per ton as therein stipulated. The contract contained a provision to the effect that the defendant should have the option to renew the agreement for a second year, but failed to specify the time within which defendant should elect to renew the agreement. By its terms the contract expired on August 27, 1906. Within the year following such expiration plaintiff delivered to defendant a certain amount of salt alleged to be of the reasonable market value of \$2,525.50 and for the recovery of which, less payments made, this suit was instituted. Defendant claims that, pursuant to the provisions of the agreement according such right, it renewed the contract under which it was entitled to the salt so delivered at the price specified therein.

The court found there was no renewal of the contract, and gave judgment against defendant for the value of the salt. Defendant's motion for a new trial was denied, and it appeals from the order denying the same.

The evidence clearly tends to prove that defendant did not elect to renew the contract prior to its expiration on August 27, 1906. Appellant contends, however, that as the contract fixed no time when it should exercise its option to renew, it had a reasonable time after the expiration thereof within which to act, and that it did, by letter, within thirty days after its expiration, notify plaintiff of its election to renew the contract. Where a contract provides for its renewal at the election of one party thereto without fixing the time when such option shall be exercised, the time for giving notice of

such renewal cannot be extended beyond the date of the expiration of the contract. The right to renew, like other rights, must necessarily cease when there is no longer a contract under and by virtue of which to claim the privilege. (*Shamp v. White*, 106 Cal. 220, [39 Pac. 537]; *Renoud v. Daskam*, 34 Conn. 512; *Thiebaud et al. v. First Nat. Bank*, 42 Ind. 212.) Under the contract defendant was required to take the salt so purchased thereunder within one year after the date of the contract. It might with equal propriety insist that it had a right to delivery of the salt within a reasonable time after the expiration of the year as to insist upon the right of renewal of the contract after it had expired.

Appellant claims that during the year following the expiration of the contract it ordered salt from respondent as it had previously done under the contract, and that in conversations with representatives of the salt company it insisted that such purchases were made at the price stipulated in the contract. Conceding this to be true, it is clear that plaintiff never assented to the sale at such price of the salt so ordered by defendant. On the contrary, the evidence clearly tends to show that plaintiff at all times disclaimed any renewal by defendant of the contract. The invoices, copies of which are brought up in the record, included a large number of shipments of salt. Copies of these invoices accompanied each shipment, and the price of \$8.50 per ton inserted in such invoices afforded ample evidence to defendant that the price at which plaintiff was supplying the salt was greater than that of \$5 per ton stipulated in the contract.

The alleged errors of law are all based upon rulings of the court in excluding certain questions asked by defendant on cross-examination of plaintiff's witnesses. We perceive no error in any of these rulings. None of the questions constituted proper cross-examination. Moreover, the most favorable answers to these questions could not have benefited defendant, and hence, if the rulings were improper, were not prejudicial to the defendant.

The order denying defendant's motion for a new trial is affirmed.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 749. Second Appellate District.—March 10, 1910.]

WESTERN LUMBER AND MILL COMPANY, a Corporation, Respondent, **v. MERCHANTS' AMUSEMENT COMPANY** et al., Respondents, and **J. R. GAGER**, Appellant.

PACIFIC ORNAMENTAL DECORATING COMPANY, a Corporation, Respondent, **v. MERCHANTS' AMUSEMENT COMPANY** et al., Respondents, and **J. R. GAGER**, Appellant.

MECHANICS' LIENS—CONSOLIDATED ACTION—COMPLAINT WITHOUT ISSUE—STIPULATION—PROOF OF LIEN—JURISDICTION—JUDGMENT.—In a consolidated action to foreclose mechanics' liens, when no issue was joined upon the complaint in the second action, but all parties were represented by counsel, and the second plaintiff was a defendant in the other action, and appellant was defendant in both actions, and it was stipulated at the trial that the evidence should inure to the benefit of all parties, and plaintiff in the second action proved its lien without objection, the fact that a judgment was rendered against the owner appealing in favor of the plaintiff on the second action implies that the court ascertained that it had jurisdiction both of the subject matter of the second complaint and of the person of appellant before rendering such judgment.

Id.—PRESUMPTION IN SUPPORT OF JURISDICTION.—It will be presumed in favor of the jurisdiction of the superior court that the court acted upon evidence of some kind, when the record shows nothing to the contrary; and it must be presumed that the court properly discharged its duty to determine before hearing a controversy that it had jurisdiction of the cause and of the parties thereto.

Id.—PRESUMPTION OF VERITY OF RECORD.—In all matters of which the judgment contains a record, its verity, in the absence of contrary evidence, will be presumed as fully as upon collateral attack. The record is conclusive as to all matters upon which it speaks, when not impeached by the bill of exceptions.

Id.—RECITAL IN JUDGMENT-ROLL—APPEARANCE OF APPELLANT—CONTEST OF LIEN.—The recital in the judgment-roll that appellant appeared by attorney impliedly to contest the claims of lien of plaintiff in the second suit is supported by the record of the proceedings at the trial, without any attempt to impeach such recital or the evidence tending to establish its truth.

Id.—EFFECT OF APPEARANCE BY ATTORNEY.—The voluntary appearance of a defendant by attorney is equivalent to personal service of the summons and complaint.

ID.—EVIDENCE OF APPEARANCE—JUDGMENT-ROLL—BILL OF EXCEPTIONS —CONTENTION UNSUSTAINED.—Though the code does not require that an appearance shall be made part of the judgment-roll, yet when the judgment-roll recites that appellant appeared in both actions, and there is uncontradicted evidence in the bill of exceptions tending to support such recital, the contention of appellant that the court had no jurisdiction to render the judgment for plaintiff in the second action is unsustained.

ID.—SUFFICIENCY OF COMPLAINT—ABSENCE OF DEMURRER—PROOF AT TRIAL—WAIVER OF OBJECTION.—The objection that the second complaint is insufficient, in not averring either that any sum was due to the contractor, or that the contract price exceeded \$1,000, and that the contract was not recorded, was waived, and cannot be urged upon appeal for the first time, when no demurrer was interposed thereto, and it was clearly established by proof at the trial that the contract price far exceeded that sum, and the contract was not recorded. In such case, it was wholly immaterial whether any sum was due to the contractor.

ID.—NOTICE BY OWNER—CONSTRUCTION OF CODE.—Section 1192 of the Code of Civil Procedure does not give to the owner of the property two periods of time in which he may give the notice of nonresponsibility provided for therein. If he has knowledge of the intention to build, he must act on that knowledge within three days thereafter; and if not, he must move with like promptness upon obtaining knowledge of the construction.

ID.—FINDING AS TO KNOWLEDGE RENDERED IMMATERIAL—CORPORATION LESSEE AGENT FOR OWNER.—A finding that the owner did not give notice of nonresponsibility, within three days after knowledge of the intention to build, is rendered immaterial, where a finding is sustained by the evidence that the corporation was organized by the owner and his associates as an agency for the lease of the property thereto for the purpose of constructing a building thereon.

ID.—FINDING NOT INCONSISTENT WITH PLEADING.—The averment of ownership by the individual owner, and of a lease to the corporation, which constructed the building on his property, is not inconsistent with a finding supported by the evidence that the owner was merely using the corporation as an agency for the construction of such building.

ID.—OWNER ACTING THROUGH AGENT FOR BUILDING NOT ENTITLED TO GIVE NOTICE.—An owner who acts through an agent to secure the construction of a building on his land in the agent's name is not entitled to give notice of nonresponsibility under section 1192 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.
George H. Hutton, Judge.

The facts are stated in the opinion of the court.

Elon G. Galusha, and Gray, Barker & Bowen, for Appellant.

Scarborough & Bowen, for Western Lumber and Mill Co., Respondent.

Haas, Garret & Dunnigan, for Pacific Ornamental Decorating Company, Respondent.

John W. Kemp, and Kemp & Collier, for J. W. Dawson, Contractor, and for Merchants' Amusement Company, Lessee, Respondents.

Lloyd W. Moultrie, for E. G. Judah, Respondent.

Borden & Carhart, for City Mill & Mfg. Co., Whittier-Coburn Co., and L. J. Smith, Respondents.

G. P. Adams, for Howe Brothers, Respondents.

Hickcox & Crenshaw, for United Casting Co., Respondent.

TAGGART, J.—Consolidated action to foreclose mechanics' liens. Complaints were filed by Western Lumber and Mill Company and Pacific Ornamental Decorating Company. In the former action, the owner of the land, Gager, the lessee in whose name the building was constructed, Merchants' Amusement Company, the contractor, J. B. Dawson, and all persons claiming liens, including the plaintiff in the other action, the Pacific Ornamental Decorating Company, were named as defendants. In the action last entitled only the owner, lessee and contractor and two fictitious persons were made defendants. Of the defendant lienors, in the first action, Whittier-Coburn Company, E. G. Judah, City Mill and Manufacturing Company, Mutual (United) Casting Company, Howe Brothers, and L. J. Smith filed answers and cross-complaints. The defendants owner, lessee, and contractor answered to each of the cross-complaints, except that of Howe Brothers, and to the complaint of the Western Lumber and Mill Company, but did not answer the complaint of the Pa-

cific Ornamental Decorating Company, and no answers or cross-complaints were filed by anyone in the action instituted by the last-named plaintiff. Neither did the Pacific Ornamental Decorating Company file an answer or cross-complaint in the other action. Judgment was given for both plaintiffs and all the lien claimants who appeared, and a sale of the premises to satisfy the liens ordered.

This appeal is by Gager, the owner of the land upon which the building was constructed. It is contended that as to the action of the Pacific Ornamental Decorating Company, the record fails to show that jurisdiction was ever acquired of the person of the appellant, and that as to him the complaint filed by that corporation states no cause of action. A reversal of the entire judgment is also asked upon the grounds that the evidence does not sustain the finding of the trial court that appellant's attempt to post a notice of nonliability under section 1192 of the Code of Civil Procedure was ineffective, because not posted in accordance with the provisions of the section, or the finding that the Merchants' Amusement Company was merely the agent of appellant in the construction of the building on his premises, and that therefore appellant was not entitled to give the notice provided by that section.

The copy of the judgment-roll in the transcript, which is certified to be full, true and correct, contains no evidence of any service of summons or of the complaint of the Pacific Ornamental Decorating Company upon any of the defendants therein named, of any appearance by either or any of them, or of any issue joined upon any of the allegations of the complaint, and the only finding or recital in this respect is found in the findings of fact that "the plaintiffs and cross-complainants, and the various defendants appearing by their respective attorneys," etc. The bill of exceptions recites that upon the trial of the consolidated actions the attorneys for the Western Lumber and Mill Company appeared for the plaintiff, while the names of the attorneys signing the complaint in the other action appear as attorneys "for the defendant, the Pacific Ornamental Decorating Company." Appellant was represented at the trial by counsel, and it was stipulated by the parties, and ordered by the court, that "any testimony introduced in the case will be introduced

for the benefit of all the parties to the suit represented upon the trial''; and also, ''that it may be deemed that the defendants Gager and Dawson and Merchants' Amusement Company specifically deny each of the allegations in each of the cross-complaints, except the allegation that Gager is the owner of the property, . . . except also where answers are filed to such cross-complaints the case will stand on such answers.'' Unless the complaint of the Pacific Ornamental Decorating Company is assumed to have been treated the same as a cross-complaint in the other action, the latter stipulation would affect only the defendant Howe Brothers.

It is apparent from the stipulation as to the evidence, and the introduction of the notice and lien of the Pacific Ornamental Decorating Company without objection, that all parties assumed that corporation to be properly before the court to present its lien and obtain a judgment, if otherwise entitled. The question of jurisdiction was not raised at the trial, and seems to hinge upon whether or not the recital in the findings that there was such an appearance by Gager is sufficient to sustain the judgment against the attack here made.

The fact that a judgment was rendered against Gager in favor of the Pacific Ornamental Decorating Company implies that the court ascertained that it had jurisdiction of both the subject matter of the complaint and the person of appellant before rendering such judgment. It will be presumed in support of the judgment of a court of record that the court acted upon evidence of some kind. If the record discloses a recital in the judgment or judgment-roll that jurisdiction has been acquired, or facts from which jurisdiction may be inferred, there is no occasion to invoke the presumption; it is only when the record is silent that the necessity for the presumption arises. To assume that a court has proceeded to hear a controversy before determining that it had jurisdiction of the cause and the parties to the controversy would involve the presumption that the court had failed to do its duty, and such a presumption is never indulged. (*In re Eichhoff*, 101 Cal. 600, [36 Pac. 11].) While the attack upon the judgment in the case cited was a collateral one, it was said by the supreme court in another case in which the jurisdiction of the trial court to enter a judgment was ques-

tioned on a direct appeal: "The presumption of verity which attaches to the record of a domestic judgment is the same upon a direct appeal therefrom as exists in the collateral attack, the only difference being that upon a direct appeal it is essential for the party seeking to sustain the judgment to show by the record itself that the court had jurisdiction of the defendant, whereas in a collateral attack the entry of the judgment is itself conclusive of such jurisdiction. Upon a direct attack there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant; but in all matters of which the judgment contains a record, its verity, in the absence of any contradictory evidence, will be presumed as fully as upon collateral attack. The defendant may, upon a direct appeal, by bill of exceptions, present evidence outside of the record for the purpose of showing that the court did not have jurisdiction over him, while in a collateral attack such objection is available only when it appears from the record itself. In both cases the record is conclusive as to all matters as to which it speaks, unless impeached in the foregoing manner." (*Sichler v. Look*, 93 Cal. 600, 606, [29 Pac. 220].) No effort was made to impeach the recital of the trial court that the appellant appeared by attorney at the trial of the issues raised by the Pacific Ornamental Decorating Company's complaint. The same rule which permits the record to be impeached also allows a showing to be made in support of the recitals in the record, and the latter may be aided by the presentation of any facts upon which, if they appeared in the judgment-roll, a finding of jurisdiction might be predicated. The recital in the judgment-roll that appellant appeared by attorney, impliedly to contest the claim of the Pacific Ornamental Decorating Company, is supported by the record of the proceedings at the trial, while, on the other hand, no attempt is made to impeach either the recital or the evidence tending to establish its truth. The voluntary appearance of a defendant is equivalent to personal service of summons and complaint. (Code Civ. Proc., sec. 416.) A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him. (Code Civ. Proc., sec. 1014.) The code does not require such an appearance to be made a

part of the judgment-roll (*Lyons v. Roach*, 84 Cal. 27, 29, [23 Pac. 1026]), and if the judgment-roll were silent, the presumption that the court had some evidence to sustain it in assuming jurisdiction would be supported by the facts in the bill of exceptions above mentioned, and there is no evidence in conflict with this. There being, however, a recital in the judgment-roll that appellant appeared in both actions, and uncontradicted evidence tending to sustain the recital in the bill of exceptions, the contention that the court was without jurisdiction to render judgment in favor of the Pacific Ornamental Decorating Company cannot be sustained.

It is contended that the complaint of the Pacific Ornamental Decorating Company does not state a cause of action because it neither alleges that there was anything due from the owner to the contractor at the time the lien was filed, nor that the contract was for an amount exceeding \$1,000 and not recorded. No demurrer to the complaint was filed and the evidence at the trial disclosed, and the court found that the contract was to erect a building for a price exceeding \$1,000, and that the contract was not recorded. This issue having been tried and a general finding made thereon as to all the parties to both actions, without objection by appellant, or limitation by the court, it must be presumed that the trial was had and the finding made in support of the claim of the decorating company. It is, therefore, too late to object to the absence of this allegation, if necessary (which we are not to be understood as holding), at this time. It is conceded that if it had been alleged that there was a contract for an amount exceeding \$1,000 which was not recorded, it would have been unnecessary to allege there was anything due on the contract in order to bind the owner.

The finding of the trial court that appellant did not post notices under section 1192 within three days after he had obtained knowledge of the intended construction of the building thereon, and not within three days after he obtained knowledge of the actual work of construction, etc., is rendered immaterial by the other finding that the corporation lessee was the mere agent of the owner of the land in the erection and construction of the building, and that such an owner was not entitled to give the notice under section 1192, Code of Civil Procedure. No other inference could well be

drawn from the evidence than that Gager had full knowledge of, and participated in, all the acts of the corporation, either in person or by representative. He had knowledge of the intention to build as early as there was such an intention, and the lease was given to the defendant corporation and the corporation was formed for the purpose of erecting the building in question. We do not understand that the law gives to an owner two periods at which he may give the notice provided by section 1192. If he has knowledge of the intention to build, he must act on that knowledge, and at once (within three days) post the notice that all materialmen, artisans and laborers may know that he will not be responsible. If he has no knowledge of the intention upon which to act, he must move with like promptness upon obtaining knowledge of the construction. As above said, however, this is rendered immaterial, as the evidence justifies the finding that Gager was himself merely using the corporation as an instrument to carry out the venture in which that body was engaged.

We do not think the latter finding is inconsistent with the pleadings. It is true that it was both alleged and stipulated that Gager was the owner of the premises, and that the amusement company was the lessee, but neither the ownership of the former nor the holding of the lease by the latter prevented the latter from acting as the agent of the former in constructing the building. If it were alleged that Gager was the owner and the evidence disclosed that the work was done in the name of a corporation which he organized and controlled and through which he acted, a finding that he acted through such corporation as his agent would be sustained. (*Shorb v. Beaudry*, 56 Cal. 446; *Cornell v. Corbin*, 64 Cal. 197, [30 Pac. 629]; *Hunt v. Davis*, 135 Cal. 31, [66 Pac. 957].)

Judgment and order affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 9, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 9, 1910.

[Civ. No. 752. Second Appellate District.—March 10, 1910.]

HARRY H. MORGAN, Appellant, v. LOS ANGELES PACIFIC COMPANY, a Corporation, Respondent.

ACTION FOR NEGLIGENCE — VERDICT FOR PLAINTIFF — ORDER GRANTING NEW TRIAL—INSUFFICIENCY OF EVIDENCE—AFFIRMANCE.—In an action to recover damages for alleged negligence, in which a verdict was rendered for the plaintiff, an order granting a new trial for insufficiency of the evidence to sustain the verdict will be affirmed under the rules applicable to the action of the trial court upon all matters pertaining to the weight of evidence and the credibility of witnesses.

Id.—DUTY OF TRIAL COURT DISTINGUISHED.—There is an obvious distinction between the duty of the trial court and the duty of the appellate court with respect to the decision of questions of fact on a motion for a new trial. The trial court cannot rest upon a conflict of the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. Where the decision is against the weight of the evidence, it is the duty of the trial court to grant a new trial.

Id.—REVIEW OF ORDER GRANTING NEW TRIAL—DISCRETION.—Where the trial court has discharged its duty to grant a new trial, for insufficiency of the evidence, its order will not be reversed upon appeal, unless it appears that there has been an abuse of the sound legal discretion which the trial court is presumed to exercise in granting a new trial. It is only in rare instances and on very strong grounds that the appellate court will set aside an order granting a new trial.

Id.—PASSENGER RIDING OUTSIDE OF CAR—INJURY FROM PASSING CAR—ASSUMPTION OF RISK—MIXED INFERENCE OF FACT AND LAW.—A passenger riding on the outside of an electric car near the track on which other cars were passing assumed all the risks of riding where he did which the facts of the case disclosed were incurred by him. Such assumption of risk is a mixed inference of fact and law, and not a mere conclusion of law.

Id.—CONSTRUCTION OF LANGUAGE OF TRIAL JUDGE—"ASSUMED RISK." The language used by the trial judge in passing upon the motion for a new trial, "that plaintiff assumed the risk in riding where he did," must be construed so as to support the court's action, and not as declaring that assumption as a mere conclusion of law. Taking the most favorable view of the evidence in support of the order, no risk due to a defective rail or to a lurch of the car was referred to in using such language.

ID.—INSTRUCTIONS AND EVIDENCE TO BE CONSIDERED BY JUDGE.—For the purpose of passing upon the motion for a new trial, the trial judge must consider the instructions given to the jury and all evidence received without objection, whether competent or not; and he must determine the sufficiency of the evidence to sustain the verdict, in the light of the same facts and law that were before the jury.

ID.—SAFETY-BAR NOT REQUIRED BY LAW—CORRECT INSTRUCTION.—The court correctly instructed the jury that there was no law requiring the defendant to maintain a safety-bar on the side of the car on which plaintiff was riding.

ID.—ABSENCE OF SAFETY-BAR NOT NEGLIGENCE PER SE.—It was not negligence *per se* not to have a safety-bar on either side of the car.

ID.—PROVINCE OF JURY—NEGLIGENCE AS TO SAFETY-BAR A QUESTION OF FACT.—The instruction given as to the law did not preclude the plaintiff from showing or the jury from considering whether or not it was negligence upon the part of the defendant not to provide a safety-bar under such circumstances as existed here.

APPEAL from an order of the Superior Court of Los Angeles County, granting a new trial. Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

Jones & Drake, and E. B. Drake, for Appellant.

John D. Pope, J. W. McKinley, Gurney E. Newlin, and Roy V. Reppy, for Respondent.

TAGGART, J.—Action to recover damages for personal injuries sustained by plaintiff while a passenger upon an electric car of the defendant, which was being operated in the city of Los Angeles. The verdict of the jury was for plaintiff for \$5,000, and the superior court granted a motion by defendant for a new trial upon the ground of insufficiency of the evidence to sustain the verdict. This appeal is from that order.

Several other grounds of motion are stated in the notice of intention, and it appears to be conceded by appellant that if the ruling of the trial court can be sustained upon any of the grounds stated in the notice, its order must be affirmed. We think, however, that under the rules applicable to the

action of the trial court upon all matters relating to the weight of evidence and credibility of witnesses, the order of the superior court must be sustained on the ground therein stated. There is a clear and obvious distinction between the duty of a trial court and the duty of an appellate court with respect to the decision of such questions on a motion for a new trial. The trial court cannot rest upon a conflict in the evidence, but must weigh and consider the evidence for both parties and determine for itself the just conclusion to be drawn from it. Where the decision is against the weight of the evidence, it is the duty of that court to grant a new trial. In considering the question upon the motion, the trial judge must act upon his own judgment as to the effect of the evidence. In an action tried by a jury, the parties are entitled to the judgment of the jury in rendering a verdict in the first instance; but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence. (*Green v. Soule*, 145 Cal. 96, [78 Pac. 337].) The trial court having discharged this duty (which duty, says the supreme court, judges of the superior court are generally only too reluctant to perform), and made its order granting a new trial on this ground, that order will not be reversed by an appellate court, unless it appears that there has been a manifest abuse of the sound legal discretion which the trial court is presumed to exercise in passing upon such a motion. (*Pico v. Cohn*, 67 Cal. 258, [7 Pac. 680].) "It is only in rare instances and upon very strong grounds that the supreme court will set aside an order granting a new trial." (*Quinn v. Kenyon*, 22 Cal. 82.)

Plaintiff left the business part of the city of Los Angeles on one of defendant's regularly operated street-cars to go to his home in the residence district of the city, about the hour of 5 o'clock in the afternoon. When he attempted to board it he found the car was "jammed" and he could not get in the car on the right-hand side, the proper side to enter. The conductor said, "Some of you fellows will have to get off of those steps; people cannot get on and off," so he walked around to the steps at the rear of the car on the inside or left-hand side. According to his own testimony, he stood on the top step, holding himself on by the emergency brake-

wheel, while others testified that he was on the bottom step, and there was some testimony tending to show that he could not reach the brake-wheel from the position in which he stood; one witness stating that he was holding on by hooking his arm around the post. The car upon which he was riding was a wide one, being eight feet six inches across, while from tip to tip of the projecting steps it was nine feet and nine inches. The double tracks upon which the cars on this line were operated were of three feet six inch gauge and ten feet from center to center, thus leaving but three inches clear between the steps of passing cars. The distance of eighteen inches between the bodies of passing cars was also further reduced by the projection of the handle bars from each of them a distance of two and five-eighths inches. There was no safety-bar across the entrance to the car upon the steps of which plaintiff stood, and this is also alleged to be an act of negligence upon defendant's part which contributed to plaintiff's injury. The trial court instructed the jury that there was no law requiring the defendant to have a safety-bar at such a place, and one of the witnesses who stood upon the steps with the plaintiff testified, in effect, that if there had been one, it would only have rendered the position of a person standing on the top step the more dangerous, as it would have prevented him from getting his body inside the line of the car.

In the position described the plaintiff rode quite a distance without mishap, quite a number of cars being passed on the other track during this time, but when about a mile and a half from where he boarded the car he was struck by the projecting handle-bar of another car of defendant going in the opposite direction, and thrown from his place on the step to the ground, the force of the collision wrenching loose the handle-bar which struck him and precipitating that to the ground also. Plaintiff was badly injured, was in the hospital for nine weeks, and from the character of his injuries the verdict could not well be attacked on the ground that it was excessive. The negligence mainly relied upon by plaintiff is alleged to be the unsafe and defective condition of the defendant's roadbed at this point, which caused the car on which plaintiff was riding to give a sudden lurch or jerk to the side, thus throwing plaintiff's body out and causing his

head to project beyond the side of the car at the moment the other car was passing.

Plaintiff's own testimony located him as standing upon the top step with his head inside the line of the body of the car until the lurch or jerk threw him against the projecting bar. There was other evidence to sustain this view, as there was to support the theory of plaintiff that there was a lurch or sudden jerk of the car such as might have been caused by a defect in the rail. There was, however, no direct evidence of any particular defect or loose rail at the place of the accident at the time of the accident; there being, however, evidence as to the crooked condition of the track at other times when excavations were made to repair or relay the rails. Some of the other passengers who were on the car did not notice any such motion, and still others stated that there was no such swaying or rocking motion as would have been produced by a defect in the track, but merely the jerk caused by plaintiff coming in contact with the other car.

Appellant, however, quotes the language of the trial court in granting the motion to show that the order was made "because the plaintiff assumed all the risk in riding where he did," and contends that it was the evidence upon the issue of contributory negligence which the learned judge, who tried the cause, construed to support the order made. If it were necessary for us in considering the order before us to read this language of the trial judge into it, we would still be bound to interpret the language in support of the court's action. It could not be said that the evidence in the record would justify this court in saying as a matter of law that the plaintiff did *not* assume all the risks in riding where he did, and it is not necessary that we should assume for the purpose of this appeal that the declaration of the trial court that he *did* was a conclusion of law alone. At most, it was a mixed inference of fact and law, and in considering the court's language we must so regard it. So considered, it would mean only that the plaintiff assumed all the risks of riding where he did which the facts of the case disclosed were incurred by him. Thus the question of reconciling the conflicting testimony above mentioned would be before us, and, taking the most favorable view of the evidence in support of the order, there was no risk due to a defective rail or sway-

ing or lurch of the car from such a cause, referred to by the trial court when it said the plaintiff assumed all the risks in riding where he did.

For the purpose of passing upon the motion for a new trial the trial court was bound to assume the instructions given by it to correctly declare the law, as well as to consider all testimony introduced without objection, whether competent or not. (*Williams v. Hawley*, 144 Cal. 102, [77 Pac. 762].) In other words, the law given to the jury by the court and the evidence which the court permitted the jury to hear constitute the law and evidence which must be considered by the court upon a motion for a new trial. The trial judge must determine the sufficiency of the evidence to sustain the verdict in the light of the same facts and law that were before the jury. The instruction of the trial court that "there is no law requiring the defendant to place and keep in place a safety-bar on the side of the car on which plaintiff was riding at the time of the accident which resulted in his injuries," is, therefore, not before us on this appeal, except for the purpose indicated.

Treating this question as one of those which we are called upon to determine for the purposes of a new trial (Code Civ. Proc., sec. 53), we are of opinion that the instruction, as far as it went, correctly stated the law. There is neither statute nor ordinance, nor, as we are advised, legal precedent, requiring the defendant to place and keep in place a safety-bar, either in the entrance where plaintiff was riding, or in entrances of this class generally. The instruction did not preclude the plaintiff from showing, or the jury from considering, whether or not it was negligence upon the part of defendant not to provide a safety-bar under such circumstances as existed here. An appropriate instruction in this regard would no doubt have been given by the court had it been requested, but the trial court would not have been justified in saying as a matter of law that the absence of the safety-bar in this case was negligence *per se*.

The order granting the new trial is affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 755. Second Appellate District.—March 10, 1910.]

CHARLES SCHINDLER, Appellant, v. C. C. YOUNG et al., Respondents.

STREET ASSESSMENT — FORECLOSURE — SUFFICIENCY OF COMPLAINT — SPECIFICATIONS IN CONTRACT NOT INCREASING CONTRACTOR'S LIABILITY.—In an action to foreclose a street assessment, specifications in the contract pleaded that "the contractor will be required to observe all the ordinances of the board of trustees in relation to the obstruction of the streets, keeping open passageways and protecting the same where they are exposed and would be dangerous to public travel, and he will be held responsible for all damages the city may have to pay in consequence of his failure to protect the public from injury," impose no additional burdens upon the contractor, and do not affect the sufficiency of the complaint of the contractor to foreclose the assessment, and a demurrer thereto was improperly overruled.

ID.—NATURE OF PROVISION.—Such provision, while having no proper place in the specifications, is clearly distinguishable from those which have been held invalid in increasing the burdens of the contractor. It does not contemplate any obligation devolving upon the contractor after the completion and acceptance of the work; and his obligations were not increased by requiring him to take measures under an ordinance applicable to all persons for the protection of the public from dangers incident to exposed and unprotected obstructions in the highways. Nor could the city be liable to pay damages by reason of a defective street, nor by the contractor's neglect of duty in that respect, nor on account of his negligence in failing to observe the ordinances.

ID.—COST OF WORK NOT INCREASED TO DETRIMENT OF PROPERTY OWNER. Such being the nature of the provision, no ground exists for presuming that by reason of such specifications, the cost of the work was increased to the detriment of the property owner.

APPEAL from a judgment of the Superior Court of Orange County. Z. B. West, Judge.

The facts are stated in the opinion of the court.

F. C. Spencer, for Appellant.

F. O. Daniel, for C. C. Young, Respondent.

SHAW, J.—Action to recover the amount of an assessment levied for street improvement against a lot owned by defendant C. C. Young.

Defendant interposed a demurrer upon the ground that the second amended complaint failed to state facts sufficient to constitute a cause of action. The court sustained the demurrer and denied plaintiff's right to further amend, stating as a reason for such denial that it satisfactorily appeared to the court that plaintiff could not amend his complaint so as to state a cause of action. Judgment was thereupon rendered for defendant, from which plaintiff prosecutes this appeal.

We regret that respondent has not deemed the case of sufficient importance to justify him in filing points and authorities, or otherwise attempting to aid the court in arriving at a decision upon the appeal. In the absence of any suggestion on his part directing our attention to other alleged defects in the voluminous complaint, which, with exhibits, covers some thirty-five pages of the transcript, we shall assume, as stated by appellant, that the chief ground upon which the ruling of the court was based was a clause in the specifications under and in accordance with which the proceedings were had and taken and the work required to be done. This clause is as follows: "The contractor will be required to observe all the ordinances of the board of trustees in relation to the obstruction of streets, keeping open passageways and protecting the same where they are exposed and would be dangerous to public travel, and he will be held responsible for all damages the city may have to pay in consequence of his failure to protect the public from injury."

The court, no doubt, had in view the principle applied in *Brown v. Jenks*, 98 Cal. 10, [32 Pac. 701], *Blochman v. Spreckels*, 135 Cal. 662, [67 Pac. 1061], and like cases. In the former case, the specifications required the contractor to give a bond with sureties conditioned for the keeping of the street so improved in thorough repair for a period of five years from the completion of the contract. It was not only held that requiring the bond was unauthorized, but that such requirement changes and may increase the burdens of the property owner in that the contractor must charge a higher price for the work by reason of having to keep the street in repair. Clearly, its effect was to impose a duty upon the contractor other than that which the law imposed and as to

which there was no authority in law for the creation of contractual relations.

The specifications in *Blochman v. Spreckels* contained the following provisions: "The contractor shall keep good and sufficient guards around said improvements, by fence or otherwise, to prevent accident, and shall hang thereon lights, to burn from dusk until daylight; and the contractor shall hold the city harmless for any and all suits for damages arising out of the construction of said improvements. The contractor shall, when required to do so by the superintendent of streets, remove from the work any overseer, laborer, or other person, who shall refuse or neglect to obey the said superintendent in anything relating to the work, or who shall perform his work in a manner contrary to these specifications or be found incompetent or unfaithful. All loss or damage arising from the nature of the work to be done under these specifications shall be sustained by the contractor." The court in denying a recovery based its conclusions solely upon the provision requiring the contractor to sustain all loss or damage, which it is held contemplated *any damage* which might subsequently result from the *nature* of the *improvement*. It was further held that the contractual assumption of such liability was unauthorized, and its effect was to increase the burdens imposed upon the property owner. As to the other provisions contained in the specifications, it was intimated a fair interpretation would warrant holding them all to relate to damage during the progress of the work and before the city had accepted it.

In the case at bar the provision, while it had no proper place in the specifications, is clearly distinguishable from those discussed in the above and like cases. It does not contemplate any obligation devolving upon the contractor after the completion and acceptance of the work. Under the contract he assumes no duty other than that which is imposed by law or the city ordinances. His obligations were not increased by the contract requiring him to take measures prescribed by ordinance *applicable to all persons* for the protection of the public from dangers incident to exposed and unprotected obstructions in the public highways. The specifications imposed no additional burdens in this respect. So, too, the contractor in prosecuting the work was liable for

damages to persons who might receive personal injuries by reason of his negligence in failing to observe proper precautions to protect the public, but we know of no provision of law in this state under which the city could be required to pay damages to one injured in consequence of a defective street (*Arnold v. City of San Jose*, 81 Cal. 619, [22 Pac. 877]; *Chope v. City of Eureka*, 78 Cal. 588, [12 Am. St. Rep. 113, 21 Pac. 364]), or the fact of the contractor neglecting a duty thus enjoined upon him. As the city could in no event be required to pay damages on account of the contractor's negligence in failing to observe the ordinances, the requirement imposed no new or additional obligation upon him. It is, therefore, apparent that the agreement on the part of the contractor to do that which the law, in the absence of a contract, required him to do, though not under the law a subject of contract, and hence unauthorized, added nothing to his duties, obligations or liabilities. This being true, it would seem clear that no ground exists for presuming that, by reason of such specification, the cost of the work was increased to the detriment of the property owner. And since his burdens were not increased, the case is not brought within the principle announced in the cases hereinbefore cited.

The court erred in sustaining the general demurrer.

The court also sustained the demurrer interposed upon the ground that the complaint was ambiguous. An examination of the complaint discloses that, whatever uncertainty may exist therein, it is not obnoxious to demurrer on the ground of ambiguity.

The judgment is reversed, with instructions to the trial court to overrule the general demurrer and permit plaintiff to make such amendment to his complaint as he may be advised.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 764. Second Appellate District.—March 10, 1910.]

**HUGHES MANUFACTURING & LUMBER COMPANY, a
Corporation, Appellant, v. FRED E. WILCOX, Re-
spondent.**

CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDER.—The statutory liability of a stockholder of a corporation is not based merely upon his proportion of the issued stock of the corporation, but rests upon the proportion which the whole number of shares of stock subscribed and paid for by him, whether issued or not, bears to the whole number of shares of stock subscribed and paid for by other stockholders, whether issued or not at the time when the debt sued upon was created.

ID.—SUBSCRIPTION AND PAYMENT FOR UNISSUED STOCK—BONUS—EXECUTED AGREEMENT—OWNERSHIP OF STOCK.—Where the directors of the corporation authorized the whole of the unissued stock to be subscribed and paid for by the stockholders, and agreed to a bonus of bonds, for which notes were afterward substituted by an executed agreement, and the whole of the stock was thus subscribed and paid for, and the subscription was deposited with the secretary for which the notes of the corporation were received, and the whole transaction was ratified by the directors, the subscribers became owners of the stock so subscribed and paid for, by such executed agreement.

ID.—MODE OF BECOMING STOCKHOLDER—INFORMAL CONTRACT—BONDS WAIVED.—No formal contract is required to constitute one a stockholder in a corporation. Any agreement by which a person shows his intention to become a stockholder is sufficient. In this case, if the original agreement be disregarded, payment for the stock and the voluntary acceptance of the bonds agreed upon in the form of notes executed and delivered by the corporation was clearly sufficient to constitute the defendant and his associates owners of the shares of stock to the extent of their respective subscriptions. The original condition for issuance of bonds was waived by the voluntary acceptance of the notes in lieu thereof.

ID.—ABSENCE OF ENTRY OF SUBSCRIBED SHARES UPON BOOKS—OWNERSHIP NOT AFFECTED.—The absence of the entry of the subscribed shares of stock formally upon the books of the corporation does not affect the ownership of the paid-up shares.

ID.—STATUTORY LIABILITY NOT CONFINED TO ISSUED SHARES.—The statutory liability of the stockholders of a corporation does not depend upon the shares of stock being formally recorded in the name of the owners. Such a position is contrary to section 3 of article XII of the state constitution, and to section 322 of the Civil

Code, neither of which limits the liability of stockholders to those who appear on the books of the corporation to be such but include every equitable owner of stock.

ID.—FAILURE OF CORPORATION TO PERFORM DUTY TO ISSUE SHARES—ABSENCE OF DUTY OF OWNER.—The failure of the corporation to perform its duty to issue the shares paid for cannot be imputed to the owner of the stock, who has the right to assume that the proper book entries are made. No duty devolves upon the purchaser of stock from the corporation to see that not only his name, but the names of all other purchasers, together with the number of shares owned by them respectively, are entered in the books of the corporation.

ID.—ABSENCE OF ESTOPPEL—LIABILITY UNAFFECTED.—In the absence of facts constituting an estoppel, the liability of a stockholder is unaffected by the neglect of duty of the corporation to enter his name upon its books.

ID.—CONSTRUCTION OF STATUTE — “STOCKHOLDER” OR “OWNER.”—The term “stockholder” or “owner,” as used in the statute, is not confined to one who appears upon the books of the corporation as such, but to the real owner, notwithstanding the fact that the stock as shown on the books appears in the name of another. The apparent book owner may be also required to respond to a creditor, but his liability is based not upon ownership, but upon estoppel to deny ownership.

ID.—RIGHT OF OWNER TO PROTECT HIMSELF FROM LIABILITY.—It being true that the creditor of a corporation may pursue the real owner of stock upon his statutory liability, the converse must also be true, that the real owner has the right to protect himself from statutory liability by showing the real ownership of shares of stock not appearing upon the books of the corporation in addition to those so appearing as a true basis upon which to diminish his liability.

ID.—ISSUANCE OF SHARES IMMATERIAL.—Issuance of certificates of stock for stock subscribed and paid for is not necessary to constitute one a stockholder or owner of shares in a corporation.

ID.—FAILURE OF MINUTES OF CORPORATION TO SHOW ACTION OF BOARD —PAROL EVIDENCE.—It is immaterial that the minutes of the corporation failed to disclose the action of the board. At most, the minutes of the proceedings of the board are *prima facie* evidence only of its acts. In the absence of a minute entry of its proceedings, they may be proved by parol evidence.

ID.—AGREED STATEMENT OF FACTS.—It is sufficient that the agreed statement of facts upon which the case was submitted shows that the total amount of the capital stock of the corporation was subscribed and paid for, when the indebtedness sued upon was contracted, and that defendant owned 135 shares out of the \$100,000, instead of 105/530 of issued stock only as claimed by appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. George H. Hutton, Judge.

The facts are stated in the opinion of the court.

W. G. Van Pelt, and Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for Appellant.

W. S. Wright, for Respondent.

SHAW, J.—This is an action to enforce defendant's statutory liability as a stockholder of the Brand Manufacturing Company, a corporation, for the value of certain lumber and building materials sold and delivered to said corporation by plaintiff.

The only point in controversy is the extent of defendant's liability. Plaintiff contends that at the time of the transaction had with the Brand Manufacturing Company only 530 shares of its authorized capital stock of \$100,000 had been issued or sold, of which number defendant was the owner of 105 shares of the par value of \$100 each, thus fixing the defendant's statutory liability at 105/530 of the amount due plaintiff from the corporation. On the other hand, defendant contends that at the time the corporation became indebted to plaintiff the outstanding and subscribed capital stock consisted of 1,000 shares of the par value of \$100 each, of which he owned 135 shares, thus making the amount for which he was liable 135/1000 of such indebtedness, instead of 105/530, as contended for by plaintiff.

The court rendered judgment in accordance with the contention of defendant, from which plaintiff appeals.

The case was tried upon an agreed statement of facts. from which it appears the authorized capital of the corporation was \$100,000, divided into 1,000 shares of the par value of \$100 each, and that at the time the indebtedness was created, to wit, January 1, 1907, the journal, ledger and stock-book of the corporation showed that certificates for 530 shares of such stock, and no more, had been issued, and that defendant, as shown by said books, was the owner and holder of 105 shares thereof, and no more; that the minute-book of the Brand Manufacturing Company disclosed that during the summer

of 1906 the board of directors discussed plans for disposing of the unissued stock of the corporation, and at a meeting of the board held on August 29, 1906, decided that all the treasury stock should be sold, and offered the same for sale to its stockholders. On December 5, 1906, at a meeting of the board of directors, it was proposed to create a bonded indebtedness of \$50,000, out of which there should be issued to the subscribers for the 470 shares of the unissued stock of the corporation bonds in an amount equal to the par value of the stock for which they subscribed; that thereupon, on December 8, 1906, defendant and others agreed among themselves in writing to take the entire amount of unissued treasury stock of 470 shares upon the terms and conditions of said proposal, each subscribing for the number of shares set opposite his respective name, defendant subscribing for thirty shares of the stock.

This agreement was delivered to the secretary of the company, and at a meeting held on December 8th, the board of directors agreed that the subscribers, on paying the money under their subscriptions, should receive interim notes from the company to hold until the bonds could be finally printed and delivered, but no minute entry of this agreement appears in the minute-book. Defendant subscribed for thirty shares of the stock, and he and the other signers of the agreement in due course paid the amount of their respective subscriptions covering the entire 470 shares of stock, and part of them, including defendant, received the interim notes referred to covering the amount of their respective subscriptions, but no certificates of stock were ever issued. On May 14, 1907, at a meeting of the board of directors, it was resolved that the company go into liquidation, and at a subsequent meeting of the stockholders of the company, held on May 24, 1907, at which all of the subscribers of the 470 shares of stock, together with two-thirds of the old stockholders, were present, it was resolved by said stockholders that, instead of issuing the bonds authorized by the board of directors at the meeting held on December 5, 1906, the president and secretary be authorized and directed to issue the company's notes payable on demand to such stockholders as had not already received notes to cover cash advanced by them to the company upon subscriptions for stock for which

they had expected the company's bonds; the said notes to be dated as of even date with the dates on which such subscribers had paid in the amounts of their subscriptions to the stock of said company, which notes were issued and delivered in accordance with such resolution; and it was further unanimously resolved that said meeting ratify and confirm all the acts of the board of directors done subsequent to the last stockholders' meeting. Subsequently, the company was by its creditors thrown into bankruptcy, which proceedings are still pending.

Appellant contends that the corporation was not a party to the agreement signed by defendant and others, who "agreed together to join in taking up the treasury stock of the corporation," upon the understanding that they should have a bonus in seven per cent bonds of the corporation. Delivery to the secretary of the company of the agreement whereby the subscribers agreed to take the 470 shares of stock constituted an acceptance of the proposal made by the board of directors. The substitution of notes of the corporation, which the subscribers accepted in lieu of bonds, was to such extent a modification of the agreement by consent. As thus modified, the contract was fully executed. No formal contract is required to constitute one a stockholder in a corporation. "Any agreement by which a person shows an intention to become a stockholder is sufficient." (Cook on Corporations, sec. 52.) In this case, disregarding the agreement, payment for the stock and voluntary acceptance of the bonus agreed upon in the form of notes executed and delivered by the corporation was clearly sufficient, in the absence of other objection, to constitute defendant and his associates owners of the shares of stock to the extent of their respective subscriptions. Conceding the subscription to have been conditional upon the issuance of the bonds, as claimed by appellant, and that without complying with the condition the corporation could not have enforced the contract, nevertheless, this condition was waived by the voluntary acceptance of the notes in lieu of the proposed bonds.

No entry appears in the books of the corporation showing defendant to be the holder of these thirty shares of stock for which he had subscribed and paid the purchase price thereof. Appellant contends that by reason of this fact de-

fendant cannot as regards these shares be deemed a stockholder in the company; in other words, that we must indulge in the conclusive presumption that the corporation complied with the provisions of section 14 of article XII of the constitution, which requires that books be kept by the corporation wherein "shall be recorded the amount of capital stock subscribed and by whom," together with "the names of the owners of its capital stock and the amount owned by them respectively"; and that the statutory liability of a stockholder must be based upon the ownership and amount of capital stock subscribed as appears from the entries in the books. We find no authority in support of this position. It is contrary to section 3, article XII, of the constitution, and in direct conflict with the provisions of section 322 of the Civil Code, which provides: "Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. . . . The term 'stockholder,' as used in this section, applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another." Neither section 3 of article XII, nor said section 322, limits the ownership of shares of stock to one whose name appears upon the books of the corporation as the owner thereof. The constitution, section 14, article XII, imposes upon a corporation the duty of entering in books kept for that purpose the amount of its subscribed capital stock, by whom subscribed, the names of the owners of its stock and number of shares owned by them respectively. Failure to perform such duty by the corporation, however, cannot be imputed to the owner of the stock, who has a right to assume that the proper book entries are made. No duty devolves upon the purchaser of stock to see that not only his name, but the names of all other purchasers, together with the number of shares owned by them, respectively, are entered in the corporate books. Hence, in the absence of facts constituting an estoppel—and none appears here—his liability is unaffected by such neglect of duty on the part of the corporation. The term "stockholder" or "owner," as used in the

statute, is not confined to one who appears upon the books of the corporation as such, but to the real owner, notwithstanding the fact that the stock as shown by the books appears in the name of another. While the latter, though not the owner, may be required to respond to a creditor of the corporation, such liability is based, not upon ownership, but upon grounds of estoppel to deny ownership. (*O'Connor v. Witherby*, 111 Cal. 523, [44 Pac. 227]; *Baines v. Babcock*, 95 Cal. 581, [29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776]; *Abbott v. Jack*, 136 Cal. 510, [69 Pac. 257]; *Hurlburt v. Arthur*, 140 Cal. 103, [98 Am. St. Rep. 17, 73 Pac. 734].) To hold that a creditor of a corporation cannot recover from an owner of stock upon a statutory liability because the corporation has neglected to make the proper book entries of his holdings, showing him to be a stockholder, would nullify the provisions of both the constitution and statute. This being true, then, in the absence of acts constituting an estoppel, the converse of the rule must likewise be true, namely, that where the corporate books fail to disclose an increased subscription of stock, by reason of which increase (whether his own subscription or that of another, or both) the stockholder's liability, as in the case at bar, is less than it would otherwise be, he is entitled to establish such fact and insist upon his statutory liability being fixed upon such basis.

Appellant has cited a number of cases in support of its contention. An examination of these cases will disclose the fact that the creditor was pursuing one whose name appeared upon the books of the corporation as a stockholder, but who denied liability upon the ground that he was not the owner of the stock, and where recovery was had it was based upon grounds of estoppel. (See cases above cited.) And where recovery was denied against one who was not in fact the owner, but appeared upon the books to be a stockholder, it was due to a finding that he was not guilty of acts, either of omission or commission, which would, as against the creditor of the corporation, estop him from denying ownership. (*Welch v. Gillelen*, 147 Cal. 571, [82 Pac. 248]; *Shattuck etc. Co. v. Gillelen*, 154 Cal. 779, [99 Pac. 348].)

The fact that no stock was issued to defendant and the other subscribers is immaterial. Issuance of the certificates of stock is not necessary to constitute one a stockholder or

owner of shares in a corporation. (*Garretson v. Crude Oil Co.*, 146 Cal. 188, [78 Pac. 838]; *California S. Hotel Co. v. Callender*, 94 Cal. 120, [28 Am. St. Rep. 99, 29 Pac. 859]; *Pacific Fruit Co. v. Coon*, 107 Cal. 447, 452, [40 Pac. 542].) It is likewise immaterial that the minutes failed to disclose the action of the board taken in regard to certain matters. At most, the minutes of the proceedings of the board of directors are *prima facie* evidence only of its acts. In the absence of minute entry of its proceedings, they may be proved by parol evidence. The agreed statement of facts upon which the case was submitted shows the amount of the subscribed capital stock of the corporation to have been \$100,000, divided into 1,000 shares of the par value of \$100 each, of which defendant was the owner of 135 shares.

The judgment is affirmed.

Allen, P. J., and Taggart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 9, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 9, 1910.

[Civ. No. 775. Second Appellate District.—March 10, 1910.]

JOHN BROWN, Respondent, v. H. J. CALDWELL and D. W. TUNGATE, Appellants.

APPEAL FROM JUDGMENT—ABSENCE OF SUMMONS, DEMURRER OR ANSWER—RECITAL IN JUDGMENT OF APPEARANCE BY ATTORNEYS.—Upon an appeal from a judgment upon the judgment-roll, the judgment cannot be reversed merely because the judgment-roll contains no summons or evidence of service thereof, nor any demurrer or answer, where the judgment recites that the defendants so appealing appeared by attorneys, and there is nothing in the record to contradict such recital.

ID.—NOTICE OF APPEARANCE NO PART OF JUDGMENT-ROLL.—While, under section 1014 of the Code of Civil Procedure, the answer or demurrer therein provided for is made by section 670 thereof part of the judgment-roll, the notice of appearance provided for in the former section is made no part of the judgment-roll.

Id.—EFFECT OF RECITAL IN JUDGMENT—PRIMA FACIE EVIDENCE—PRESUMPTION—SUPPORT OF FINDING.—The recital in the judgment that defendant appeared by his attorneys is *prima facie* evidence of such fact; and where nothing appears in the record upon appeal in contradiction of the fact so found, it must be presumed that the evidence presented to the court fully supports such finding. All presumptions are in favor of the correctness of the judgment appealed from.

Id.—JURISDICTION OF PERSON—ENTRY OF DEFAULT NOT ESSENTIAL TO JUDGMENT.—It appearing that the court obtained jurisdiction of the person of the defendant so complaining, by reason of his appearance, no formal entry of his default was necessary to enable the court to render judgment against him by default.

Id.—EXCESSIVE ALLOWANCE OF INTEREST—MODIFICATION OF JUDGMENT. Where no issue was joined on the question of interest, no relief can be granted to the plaintiff in excess of the interest credited and claimed to be due only from a certain date; and the judgment must be modified as to interest allowed from a prior date. As against the defaulting defendant, the relief granted could not exceed that prayed for in the complaint.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

Watkins & Blodget, for Appellants.

T. M. Stewart, for Respondent.

SHAW, J.—Action to recover from defendants on their joint and several promissory note.

The appeal is from a judgment rendered against both defendants, and is prosecuted upon the judgment-roll alone.

On behalf of appellant Tungate, it is contended that the judgment as to him should be reversed, for the reason that it does not appear that any summons was ever issued or served upon him; nor does the judgment-roll disclose any answer, demurrer or other appearance filed on his part. The judgment, however, recites that defendant Tungate appeared by Watkins & Blodget, as attorneys for himself and his co-defendant Caldwell. Section 1014, Code of Civil Procedure, provides that “a defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his

appearance, or when an attorney gives notice of appearance for him." While under the provisions of section 670, Code of Civil Procedure, his answer or demurrer is made a part of the judgment-roll, the notice of appearance which he may give to plaintiff, or which his attorney is authorized to give under the provisions of section 1014, *supra*, constitutes no part of such roll; hence, failure to serve Tungate with a summons, and the absence of an answer, demurrer or other appearance on his part, all of which appears from the judgment-roll, is not inconsistent with the fact recited in the judgment that he did appear in one of the other modes authorized by law, evidence of which, under the statute, constitutes no part of the judgment-roll. "The code does not require such appearance to be made part of the judgment-roll; and as appellant appeals upon the judgment-roll alone, which shows nothing contradictory of or inconsistent with said recital (which was that defendant regularly appeared in said action by ———, an attorney of the court), it must be taken as at least *prima facie* true." (*Lyons v. Roach*, 84 Cal. 29, [23 Pac. 1026].) In the case of *Sichler v. Look*, 93 Cal. 606, [29 Pac. 221], the court, in discussing a like question, says: "The recitals in a judgment are the court's record of its own acts, and although upon a direct appeal the jurisdiction of the court is not to be established by its mere assertion in the judgment that it had acquired jurisdiction, yet if such recital finds support in other portions of the record, which under any condition of facts could exist, it will be presumed, in the absence of any contradictory showing, that such condition of facts existed." All presumptions are in favor of the correctness of the judgment. (*Parker v. Altschul*, 60 Cal. 380.) While defendant claims the recital of appearance is not sustained by the facts, he offers nothing in contradiction of the fact so recited, other than the judgment-roll, which, as we have seen, is insufficient for the reason that the code does not require the fact of defendant's appearance to be shown in such roll. Since the court has found that he did appear by attorney, we must presume, in the absence of a contrary showing, that the evidence presented to the court fully supports such finding. (See, also, *In re Eichhoff*, 101 Cal. 600, [36 Pac. 11].) In the case of *Weeks v. Gold Min. Co.*, 73 Cal. 599, [15 Pac. 302], and other

cases cited by appellant, the judgment attacked did not contain a recital of appearance by defendant, but recitals of facts required to be shown by the judgment-roll, which recitals were contradicted by the facts thus shown.

If the judgment against Tungate was in fact rendered without jurisdiction of the person, he is, of course, entitled to relief therefrom, but not in this proceeding nor upon the record before us.

The court having obtained jurisdiction of the person of defendant by reason of his appearance, no formal entry of his default was necessary to enable it to render judgment against him. (*Drake v. Duvenick*, 45 Cal. 455; *Hibernia S. & L. Soc. v. Matthai*, 116 Cal. 424, [48 Pac. 370].)

On behalf of appellant Caldwell, it is claimed that as the judgment is against both himself and Tungate, it must, if reversed as to the latter, fail also as to him. The foregoing views render it unnecessary to discuss his rights from such standpoint.

The note sued upon was for the sum of \$1,000, bearing interest at the rate of ten per cent per annum from date, payable semi-annually, and dated February 1, 1907. The complaint alleges: "That said promissory note has not been paid, nor any part thereof, or the interest thereon, save and excepting the sum of fifty (50) dollars; that there is now due, owing and unpaid to the said plaintiff on said promissory note the whole of the principal sum of one thousand (1,000) dollars, U. S. gold coin, together with interest thereon at the rate of ten per cent per annum from April 1, 1908." The prayer of the complaint follows this allegation, praying for judgment for \$1,000 and interest at ten per cent per annum from April 1, 1908. No issue was raised by either defendant as to the amount alleged to be due. In no event could recovery against Tungate exceed the sum prayed for in the complaint. (Code Civ. Proc., sec. 580.) The allegation of the complaint as to the amount unpaid on the note is somewhat ambiguous. Construing it most strongly against the pleader, the sum alleged to be unpaid upon the note is \$1,000, with interest from April 1, 1908, for which plaintiff prays judgment. Since defendant by his answer raised no issue as to the sum claimed to be due and unpaid, we think the rule applicable to one not answering is likewise appli-

cable to one admitting such allegation. The court, however, in rendering judgment, computed interest from August 1, 1907, instead of from April 1, 1908. To the extent of the interest accruing prior to April 1, 1908, amounting to \$73.55, the judgment is erroneous.

It is, therefore, ordered that upon the going down of the remittitur the trial court modify the judgment by deducting therefrom, as of the date of its rendition, the sum of \$73.55, and as thus modified the judgment is affirmed. It is further ordered that appellants recover costs of this appeal.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 772. Second Appellate District.—March 10, 1910.]

GEORGE I. EELLS, Respondent, v. THE GRAY BROS. CRUSHED ROCK COMPANY, a Corporation, Appellant.

CORPORATION—LIABILITY FOR TREES SOLD AND DELIVERED FOR ORCHARD—DIRECTION OF SECRETARY TO MANAGER OF ORCHARD—APPARENT AUTHORITY.—Where a corporation owning an orchard was accustomed to authorize the purchase of budded trees therefor by the direction of its secretary to the manager of the orchard, the secretary had apparent authority to represent the corporation, and it is liable for budded trees sold and delivered at such orchard by request of the manager upon such apparent authority of the secretary, and which upon his direction were planted and used in the orchard.

ID.—ABSENCE OF FORMAL RESOLUTION BY DIRECTORS IMMATERIAL.—The fact that no formal resolution was passed by the board of directors of the corporation authorizing the secretary to give such orders for trees for the orchard through its manager is immaterial. No such resolution was necessary.

ID.—APPARENT AUTHORITY—ESTOPPEL OF CORPORATION.—If a corporation clothes its officer or agent with apparent authority to act for it in a particular matter, it will be estopped to deny such authority as against persons dealing with such officer or agent in good faith, and in ignorance of any limitations upon his authority.

APPEAL from a judgment of the Superior Court of Orange County. Z. B. West, Judge.

The facts are stated in the opinion of the court.

Ames & Manning, for Appellant.

R. Y. Williams, and Williams & Rutan, for Respondent.

SHAW, J.—Action to recover the value of certain nursery stock, consisting of budded walnut trees, alleged to have been sold and delivered to defendant at its special instance and request.

Judgment was rendered for plaintiff. The appeal is from the judgment and an order denying defendant's motion for a new trial. Defendant offered no evidence, and the only point which it urges as ground for reversal is that the court erred in denying defendant's motion for a nonsuit.

Defendant is a corporation and, as shown by the evidence, the owner of a twenty-four acre orchard in Orange county, which for ten or twelve years prior to the commencement of this suit had been in the care and under the management of one William E. Case. The trees were delivered to defendant at the request of Case, who, pursuant to oral instructions given him by the secretary of the corporation, and acting on its behalf, ordered them delivered at defendant's orchard, and the fair inference from the evidence is that upon their delivery he planted them upon defendant's land, as he was instructed to do by defendant's secretary. Subsequently, the bill for the trees was sent to defendant, who, on November 27, 1908, returned it to plaintiff with the request that it be submitted to "Mr. W. E. Case, who has charge of our place, for his approval." On January 6, 1909, defendant, in reply to plaintiff's demand for payment, wrote: "In reference to the payment of the same [the bill for the trees], we would ask if it would not be satisfactory if we would send you a sixty and a ninety day note covering the amount as you want to close up the estate." It further appears from the evidence that it was and had been the custom of defendant to transmit directions to Case, its manager, regarding the care of the orchard, through its secretary. Case testifies that

“sometimes it was one (the secretary) and sometimes the other; whichever one happens to be there, and sometimes they write about it.” It thus clearly appears that the secretary, who directed the purchase, was clothed with apparent authority to act in the matter. The fact that the board of directors adopted no formal resolution conferring such authority upon him is immaterial; it was not necessary. “If a corporation clothes an officer or agent with apparent authority to act for it in a particular matter, it will be estopped to deny such authority as against persons dealing with him in good faith, and in ignorance of limitations upon his authority.” (Clark and Marshall on Private Corporations, sec. 707.) It is unnecessary to cite authorities in support of this proposition; suffice it to say that we cannot perceive how the court, under the facts here presented, could have reached any conclusion other than that which resulted in the judgment rendered for the value of the trees so delivered to defendant and by its agent planted upon its land.

The judgment and order appealed from are affirmed.

Allen, P. J., and Taggart, J., concurred.

[Civ. Nos. 755, 757. First Appellate District.—March 11, 1910.]

FRANK J. SULLIVAN, Administrator of Estate of MICHAEL P. SULLIVAN, Deceased, Respondent, v. THE MORTON DRAYING AND WAREHOUSE COMPANY, a Corporation, and J. B. BOCARDE DRAYAGE COMPANY, a Corporation, Appellants.

ACTION FOR DEATH—NEGLIGENCE OF DRAYAGE CORPORATIONS—COLLISION—NEGLIGENCE OF SINGLE COMPANY—NONSUIT.—In an action for the death of plaintiff's intestate, caused while he was engaged in his usual avocation upon a railroad box-car, by the collision of loaded drayage teams belonging to the corporations appellant, it is held, upon examination of the record upon appeal, that the liability for the death is limited to the last-named corporation appellant, and that the Morton company, appellant, was entitled to a nonsuit, there being insufficient evidence to sustain the verdict as to it.

Id.—NEGLIGENCE—CONSTRUCTION OF CITY ORDINANCE—FORBIDDEN USE OF UNLOCKED DRAY—QUESTION FOR CITY AUTHORITIES.—A part of a city ordinance which makes it unlawful to drive or use a truck or dray without having attached to the body thereof a suitable chain for locking its wheels, presents only a question for the city authorities, and does not involve the question of negligence.

Id.—STATUTORY NEGLIGENCE—LEAVING TEAM AND DRAY IN STREET UNLOCKED.—A provision of such ordinance making it unlawful for any person to "leave" any animal controlled by him, if attached to a dray or truck, upon the public street, without first securely locking its wheels, when violated, presents a case of statutory negligence, for which the owner of such team would be responsible.

Id.—ORDINANCE NOT VIOLATED—ABSENCE OF STATUTORY NEGLIGENCE—TEAM AND DRAY NOT LEFT.—Where the teamster, after loading his dray, did not "leave" the same in the street within the meaning of the ordinance, but turned his horses away from the box-car, and proceeded to fasten his loaded dray with ropes, when another team negligently collided with his team, and frightening the same made them back onto the box-car causing the death, the death was proximately caused by such colliding team, and the owner of the frightened team is not chargeable with statutory negligence.

Id.—MEANING OF WORD "LEAVE" IN ORDINANCE.—The word "leave," as used in the ordinance, is to depart or go away from, to quit; and the ordinance means to abandon for a time, to go away from the immediate charge and supervision of the animal or animals so left.

Id.—PENAL NATURE OF ORDINANCE—CONSTRUCTION—ORDINARY SENSE OF WORDS.—The ordinance is penal in its nature, and cannot be extended beyond its plain words, and in its ordinary common sense meaning. No ordinary person would say that a teamster tying up his load had left his team.

Id.—BURDEN OF PROOF OF NEGLIGENCE—BURDEN NOT SUSTAINED.—A plaintiff seeking to recover against a defendant for negligence has the burden to prove it, either directly or by facts and circumstances from which negligence may be inferred. *Held*, that such burden was not sustained to show any liability of the Morton company, appellant, under the ordinance in question by reason of its teamster being engaged in fastening up his load, though not holding his lines while so engaged.

Id.—EVIDENCE—SUFFICIENT WIDTH OF SPACE BETWEEN TEAMS FOR PASSAGE—HARMLESS ERROR.—Any error in excluding evidence offered by the Bocarde company to prove that there was an amply sufficient width of space for passage of its team between the Morton team and the railroad track, was harmless, where such proof was otherwise made, and where proof of such sufficient width made it all the more inexcusable negligence for the Bocarde team to collide with and frighten the Morton team, thus causing it to back upon the box-car.

ID.—EXPERT EVIDENCE PROPERLY EXCLUDED—MATTER OF COMMON KNOWLEDGE—PROVINCE OF JURY.—The testimony of experts as to how near a team may drive in relation to another team in the exercise of care and skill in approaching the same and driving past without danger was properly excluded, such question not being one relating to science, art or trade, but being a matter of common knowledge for the jury to determine. It is well known that most animals will shrink or retire from approaching danger, and that a team of horses, upon being run into or struck by the harness or wagon of an approaching team, would be likely to pull back or retire, so as to avert the danger.

ID.—AMENDMENT OF COMPLAINT—CHARGE OF ABSENCE OF LOCK ON WHEELS.—It was not error for the court to allow an amendment to the complaint to charge that the Morton company was negligent in driving its truck without any suitable chain for locking its wheels. The Bocarde company cannot complain of such amendment.

ID.—INSTRUCTIONS—ABSTRACT REQUEST INAPPLICABLE TO EVIDENCE.—An appellant was not injured by the refusal of a requested instruction, which, though abstractly correct, was inapplicable to the evidence, it appearing that the court gave other instructions fully covering the law applicable to such appellant.

ID.—FINDINGS—CONSISTENCY—PROXIMATE CAUSE OF DEATH.—The findings of the jury upon special issues submitted to it are held not to be inconsistent with each other or with the general verdict. The court found upon sufficient evidence that the driver of the Bocarde team carelessly and negligently drove his team in front of the horses of the Morton company; that this caused the Morton company team to back, and that this was the proximate cause of the injury to the deceased.

ID.—IMMATERIAL FINDING—ABSENCE OF CHAIN ON WHEELS OF MORTON COMPANY—NEGLIGENCE OF OTHER COMPANY NOT EXCUSED.—The finding to the effect that if the Morton company had supplied its dray with a suitable chain, and that if the chain had been used and the wheels locked the accident would not have occurred, is not material, and does not in any way excuse the negligence of the Bocarde company. Unless the Morton company was guilty of negligence by reason of the violation of the ordinance, the condition and equipment of its dray was wholly immaterial.

APPEALS from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Jesse W. Lilienthal, and Albert Raymond, for Morton Draying and Warehouse Company, Appellant.

Myrick & Deering, for J. B. Bocarde Drayage Company, Appellant.

William J. Herrin, for Respondent

COOPER, P. J.—This action was brought against defendants to recover damages caused by reason of their alleged joint negligence in causing the death of plaintiff's intestate. The jury returned a verdict in favor of plaintiff against both defendants, and judgment was accordingly entered. Each defendant appeals in a separate record from the judgment and the order denying its motion for a new trial, and from an order denying its motion to vacate the judgment, but both appeals will be considered together. In this opinion the appellants will be referred to as the Morton company and the Bocarde company, respectively.

Upon an examination of the record we are of the opinion that the motion of the Morton company for a nonsuit should have been granted, and that the evidence is not sufficient to sustain the verdict as to it.

The evidence shows that while deceased was standing at the door of a railroad box-car, with his back toward the dray of the Morton company, in a place of apparent safety, where he was following his usual avocation, the dray, which was from four to six feet from the car, and which had just been loaded with freight, consisting of boxes, tent-poles, tents and government supplies, was backed up by the team jerking backward toward the car, thus catching deceased between the dray and the car, crushing and killing him. The evidence tended to show that while the Morton dray was standing in the street, and about four to six feet from the said car, with two horses attached, a team with the dray attached belonging to the Bocarde company was carelessly and negligently driven into the Morton company's team, thereby frightening the team and causing it to back the dray against the car. There is no claim made as to negligence on the part of the Morton company except that it was guilty of statutory negligence in violating an ordinance of the city and county of San Francisco, which ordinance is as follows:

“Section 1. It shall be unlawful for any person using or having control of any animal to leave the same upon any public street without being securely fastened, unless it be attached to a dray, truck or water-cart; or, if attached to a dray, truck or water-cart, to leave such animal upon the public street without first securely locking the wheels of the vehicle to which it is attached.

“2. It shall be unlawful for any person to drive or use any truck, dray or water-cart without having attached to the body thereof a suitable chain for locking the wheels thereof.

“3. Any person who shall violate any of the provisions of this ordinance shall be guilty of a misdemeanor.”

It is admitted that the Morton company's dray did not have attached to the body thereof a suitable chain for locking the wheels, and that the wheels were not locked at the time of the accident. In so far as the Morton company violated the ordinance by not having a suitable chain attached to its dray, that is a matter entirely with the city authorities in a proper proceeding, and in no way applies to the facts here. If the driver of the Morton company's team left it upon a public street without first securely locking the wheels of the dray, the company would be guilty of statutory negligence, and this would be so even if a suitable chain had been attached to the body of the dray. The question, then, as to the Morton company, is narrowed down to the single one as to whether or not its driver left the team upon the public street within the meaning of the ordinance.

The evidence shows, without conflict, that the Morton company's driver, Sorensen, had just finished loading the dray with freight, tent-poles and tents in cases; that he then pulled away from the car from four to six feet, stopping the team and heading the horses toward Sixth street; that he then took a rope and was engaged in fastening the load and tying the cases when he heard someone give the alarm, and immediately he observed that his team was backing from the fright caused by the approach of the Bocarde team and dray. Sorensen did not then have hold of the lines, but he was right at the dray and engaged in fastening the load. Immediately upon hearing the alarm and seeing the team backing he jumped on the footboard and drove the horses up so as to release deceased.

In our opinion the driver had not left the team within the meaning of the ordinance. The meaning of the word "leave" as used in the ordinance is, to depart or go from, to quit. We use the word "leave" in such sense when we say, "He has just left the house," or "He left his plow in the furrow," or "He has left his wife and children." Thus Milton says (P. L. XI, 1, 269):

"Must I leave thee, Paradise? thus leave
Thee, native soil; these happy walks and shades?"

The ordinance means, to depart from, to abandon for the time, to go away from the immediate charge and supervision of the animal or animals so left. It is penal in its nature, and cannot be extended beyond its plain words and its ordinary common sense meaning. No one in the ordinary walks of life would say that a teamster, while tying up his load, had left his team. If the ordinance had said that no one should let loose of the lines by which his horses are held without first securely locking the wheels the meaning would be very different; but if the respondent's contention is correct, the driver who should attach his lines to the seat or lever of the brake, and get down on the ground to lock the wheels, would be guilty of leaving his team, at least while going from his seat to the wheels. Such is not the meaning of the ordinance.

In *Wasmer v. Delaware etc. R. R. Co.*, 80 N. Y. 212, [36 Am. Rep. 608], the ordinance of the city made it unlawful for any person to leave a horse in the street unless securely tied. The court, in passing upon the meaning of the ordinance, said: "It cannot be supposed that it was intended by this ordinance to require all venders or peddlers of commodities in the streets to tie their horses or have someone hold them while they are momentarily engaged in delivering the commodities to persons in the streets or at the doors of the houses along the streets. Nor can it be supposed that it was intended to inflict a penalty upon every person who should fail to tie or hold his horses in the streets while standing near them. The ordinance was manifestly intended to reach the cases of persons who might leave their horses in the streets not tied, and go away from them out of sight, or to such a distance as to lose that control which persons may usually exercise over horses when near them."

In *Oddie v. Mendenhall*, 84 Minn. 58, [86 N. W. 881], the ordinance provided that it should be "unlawful for any person to leave any horse attached to a vehicle in a street without fastening such animal in the manner provided for herein." The court said: "A reasonable construction must be given to this ordinance. Its object was evidently to prevent drivers from leaving horses standing in the streets without control. It cannot be held that this ordinance must be construed to require a person getting out of a wagon or carriage to hitch the horse attached thereto, even though occupants of the carriage remain therein." (See, also, *Monroe v. Hartford etc. Co.*, 76 Conn. 201, [56 Atl. 498]; *Rowe v. Reneer*, 30 Ky. Law Rep. 545, [99 S. W. 250].)

It is incumbent upon a party seeking to recover against a defendant by reason of alleged negligence to prove such negligence, and this proof may be either direct, or by the proof of facts and circumstances from which negligence may be inferred. In this case there is no attempt to prove any fact or circumstance, as to the Morton company, except the fact that its team attached to the dray was standing on one of the public streets of the city and county of San Francisco, and that the driver of the team was not holding the lines, but was with the dray or truck engaged in fastening the load, and near to and within easy access to the team. In such case we cannot hold that the Morton company is liable under the ordinance.

As to the Bocarde company, other errors are alleged, which we will consider in their order.

The court excluded certain testimony offered by the Bocarde company for the purpose of showing the space between the horses of the Morton company and the tracks of the Southern Pacific Railroad Company to the south on King street. It is claimed by the Bocarde company that the offered testimony was material and that it should have been permitted in order to show that there was plenty of room for its team to pass between the team of the Morton company and the railroad track. While in our opinion it would have been better for the court to have admitted the testimony and to have allowed the cross-examination more scope in order that the jury might be fully informed upon each and every phase of the case, yet we do not think the rulings of sufficient importance to justify a reversal of the case. The witness Ryan testified to this

point, and when asked by counsel what was the space, answered, "I think the width of this room." The question as to the space was fully covered by the evidence of the witnesses Rich, Free and Archibold. Not only this, but there is testimony in the record amply sufficient to sustain the finding of the jury that the Bocarde company's team was negligently driven into the team of the Morton company, thus causing it to back, and in such case it is not very material as to whether the space was eight feet or fifteen feet in width. If the driver of the Bocarde team had plenty of space and yet drove into or against the horses of the Morton team, it would tend to show a still greater degree of negligence.

The court did not err in excluding the testimony of experts as to how near in the exercise of care and skill the driver of a team can approach the heads of the horses of another team and drive past without danger, or as to the custom or peculiarities of horses in settling back in their breeching. The question was not one relating to science, art or trade. As to how near the driver of one team can approach the horses' heads of another team without danger necessarily depends upon a variety of circumstances, such as the location, the kind of team being driven, and the kind of team being approached, and the kind of vehicle to which the team is attached. These were matters of general, every-day knowledge, observation and experience, and the jurors hearing the evidence and all the facts were as capable of forming correct conclusions as any so-called experts could be. We all know that most animals will shrink or retire from approaching danger, and that a team of horses upon being run into or struck by the harness or wagon of an approaching team would be very likely to pull back or retire so as to avert the danger.

It was not error for the court to allow the plaintiff to amend his complaint by alleging, as an act of negligence on the part of the Morton company, that it drove its truck without having attached thereto a suitable chain for locking the wheels (*Ryan v. Oakland Gas Light etc. Co.*, 10 Cal. App. 484, [102 Pac. 558]). Not only this, but the Bocarde company has no right to complain of an amendment tending to show negligence on the part of the Morton company.

The Bocarde company was not injured by the refusal of the court to instruct the jury that "Men in governing their con-

duct, in the absence of knowledge to the contrary, are entitled to assume that others have not violated the law." The proposition as stated in the abstract may be correct, but it has no application to the facts here. It was evidently intended to be considered in connection with the claim that the driver of the Morton team had left his dray without locking the wheels; but, as has been before stated, the driver had not left his team within the meaning of the ordinance. The court gave other instructions fully and fairly covering every material phase of the case, and as favorable to the Bocarde company as it was entitled to under the law.

The instruction numbered thirty-six, requested by the Bocarde company, was properly refused. The evidence did not warrant it, as it did not show that the Morton company had omitted to perform any duty imposed by ordinance.

The findings of the jury in regard to the special issues submitted to it are not inconsistent with each other or with the general verdict. It was found upon sufficient evidence that the driver of the Bocarde team carelessly and negligently drove his team in front of the horses of the Morton company; that this caused the horses of the Morton company to back, and that this was the proximate cause of the injury to deceased. The finding to the effect that if the Morton company had supplied its dray with a suitable chain, and that if the chain had been used and the wheels of the Morton truck locked, the accident would not have occurred, is not material, nor does it in any way tend to excuse the negligence of the Bocarde company. Unless the Morton company was guilty of negligence by reason of the violation of the ordinance, the condition and equipment of its dray was wholly immaterial.

We conclude that the judgment and orders as to the Morton company must be reversed, and as to the Bocarde company affirmed, and it is so ordered.

Hall, J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 8, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 9, 1910.

[Civ. No. 760. Second Appellate District.—March 15, 1910.]

COUNTY OF SANTA BARBARA, Respondent, v. MARY M. YATES, Appellant.

EMINENT DOMAIN—RIGHT OF WAY FOR PUBLIC ROAD—PETITION FOR OPENING—BOND TO SUPERVISORS NOT ASSAILABLE COLLATERALLY.—

In a proceeding in eminent domain by a county to condemn a right of way for a public road, the bond given to the supervisors in connection with the petition to them for the opening of the road cannot be collaterally assailed for any defect therein.

ID.—SUFFICIENCY OF PRELIMINARY STEPS—JURISDICTION OF SUPERVISORS.

While the law requires preliminary steps to be taken before the board of supervisors prior to maintaining an action by the county to condemn property of nonconsenting land owners, jurisdiction to determine the sufficiency of such steps, or whether they have been properly taken, is vested solely in the board of supervisors.

ID.—FINAL JUDGMENT OF BOARD—ORDER TO COMMENCE ACTION TO CONDEMN.—

The determination by the board as to the sufficiency of preliminary steps must be deemed the final judgment of a competent tribunal in a proceeding entirely distinct from the action to condemn. The order directing the district attorney to institute the action to condemn is in the nature of a final judgment adjudicating upon the sufficiency of all prior proceedings requisite to the making of the order.

ID.—REVIEW LIMITED TO CERTIORARI.—

If the proceedings be irregular, or any essential step therein be wanting, objection thereto should be taken by obtaining a review upon *certiorari* of such proceedings in the proper court.

ID.—INFORMALITY NOT VITIATING SUIT TO CONDEMN—CONCLUSIVE PROOF.

Under section 2690 of the Political Code, "no informality in the proceedings of the board shall vitiate said suit [to condemn], but the order of the board directing the district attorney to bring suit shall be conclusive proof of the regularity thereof."

ID.—IMMATERIAL ADDITION TO BOND—SURPLUSAGE.—

An additional insertion in the bond for the opening of the road, which is otherwise regular in form, to the statutory words "will pay all costs of viewing and surveying in case the prayer of the petition shall not be granted," of the words "and the said road finally not opened," is of mere surplusage, and does not add nor detract from the liability of the bondsmen. The bond could have reference to no road other than that indicated by the petition with which the bond was filed.

ID.—IRREGULARITY NOT AFFECTING PRIVATE RIGHTS.—

The alleged defect in the addition to the bond is at most a mere irregularity, which did not affect the private rights of the appellant whose property was condemned for a right of way for the road.

APPEAL from a judgment of the Superior Court of Santa Barbara County. Samuel E. Crow, Judge.

The facts are stated in the opinion of the court.

Canfield & Starbuck, for Appellant.

W. S. Day, District Attorney, and Wm. G. Griffith, for Respondent.

SHAW, J.—This is a proceeding instituted by the county of Santa Barbara to condemn a right of way for a public road. Mary M. Yates, one of the defendants in the proceeding, appeals upon the judgment-roll accompanied by a bill of exceptions from the judgment of condemnation.

The sole question presented for consideration is the alleged insufficiency of the bond which, under the provisions of section 2683, Political Code, is required to accompany the petition for the opening of the road. This section provides that “the petitioners must accompany the petition with a good and sufficient bond, to be approved by the board of supervisors, in double the amount of the probable cost of the viewing and laying out or altering of any road, conditioned that the bondsmen will pay all the costs of viewing and surveying in case the prayer is not granted.”

The bond presented with the petition was conditioned that the bondsmen “will pay all the costs of viewing and surveying in case the prayer of said petition is not granted, *and the said road finally not opened.*” It is contended that the insertion in the bond of the words italicized renders the bond void, and that the defect appearing in the bond itself, objection thereto may be taken collaterally in the proceeding to condemn the property. Conceding the bond to be defective as claimed, we are, nevertheless, of the opinion that objection thereto upon such ground cannot be raised collaterally. While the law requires certain preliminary steps to be taken before the board of supervisors prior to the maintenance of an action to condemn the property of nonconsenting land owners, jurisdiction to determine the sufficiency of such steps, or whether they have been properly taken, is vested solely in the board of supervisors. Its determination therein must be deemed the final

judgment of a competent tribunal having jurisdiction in a proceeding entirely distinct and separate from the action to condemn. The order directing the district attorney to institute the action is in the nature of a judgment adjudicating upon the sufficiency of all prior proceedings requisite to the making of the order. If the proceedings be irregular, or any essential step therein wanting, objection thereto should be taken by obtaining a review upon *certiorari* of such proceedings in the proper court. Not only is this rule prescribed by section 2690 of the Political Code, which provides that "no informality in the proceedings of the board shall vitiate said suit, but the said order of the board directing the district attorney to bring suit shall be conclusive proof of the regularity thereof," but it finds ample support in the authorities. (*Humboldt County v. Dinsmore*, 75 Cal. 604, [17 Pac. 710]; *County of Siskiyou v. Gamlich*, 110 Cal. 94, [42 Pac. 468]; *County of San Luis Obispo v. Simas*, 1 Cal. App. 175, [81 Pac. 972]; *County of Sutter v. Tisdale*, 136 Cal. 474, [69 Pac. 141].) In the case last cited it is said: "... the form of the bond which was presented with the petition ... became immaterial, and evidence in reference thereto ... was properly excluded by the court." In *San Luis Obispo v. Simas*, 1 Cal. App. 175, [81 Pac. 972], it is said that "none of the intermediate orders or proceedings are reviewable in this action," which "shall be determined by the court or jury in accordance with the rights of the respective parties as shown in court, independent of said proceedings before the board." While the taking of the preliminary steps required should be alleged in the complaint, it seems that the order directing the bringing of the action is in itself proof of the regularity of such proceedings.

Moreover, we are of the opinion that the bond in form is in substantial compliance with the requirements of the statute. There is no merit in appellant's contention that adding the words "and the said road finally not opened" renders the bond void for the reason that it lessens the liability of the bondsmen. The added condition is mere surplusage; the words neither add to nor detract from the liability of the bondsmen. Their obligation is to pay the costs of viewing and surveying if, after such examination and survey, the board shall deem it inadvisable to grant their petition, the granting of which

would be equivalent to the opening of the road. If the petition be denied, such denial constitutes a final disposition of the proceedings thereunder for the opening of the road, and their liability would attach at once. The proceedings being at an end, the road could not be finally or otherwise opened thereunder. It is idle to claim that the bondsmen would be released from liability because, after their petition was denied, a road covering the same territory might be opened under a dedication or purchase. The bond could have reference to no road other than that opened in the proceeding initiated by the petition with which the bond was filed, and to which it referred. At most, the alleged defect constitutes a mere irregularity, which did not affect the private rights of appellant. (*Hill v. Board of Supervisors*, 95 Cal. 239, [30 Pac. 385].)

The judgment is affirmed.

Allen, P. J., and Taggart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 14, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 12, 1910, and the following opinion was then rendered thereon:

THE COURT.—The petition for an order transferring this cause to the supreme court for a rehearing is denied. This order is not to be understood as an approval of that part of the opinion of the district court of appeal holding that the alleged defect in the bond accompanying the road petition cannot be questioned collaterally. We consider the bond sufficient for the reasons stated in the last paragraph of the opinion of the district court of appeal. Hence the question whether a material defect therein would make the proceeding void on the face of the record is not involved, and the part of the opinion relating to collateral attack is unnecessary to the decision.

[Crim. No. 205. First Appellate District.—March 16, 1910.]

THE PEOPLE, Respondent, v. BENJAMIN E. LEE, Appellant.

CRIMINAL LAW—MURDER—SUPPORT OF VERDICT FOR MANSLAUGHTER—CONFLICTING EVIDENCE—PROVINCE OF JURY—REVIEW UPON APPEAL.

When a defendant charged with murder was found guilty of manslaughter, and there is testimony in the record amply sufficient to support the verdict, the fact that the evidence was conflicting presented a question solely for the jury. It is not the province of this court to pass upon conflicting evidence where it is sufficient in substance to support the verdict.

ID.—EVIDENCE OF VENUE.—The evidence of venue is sufficient if it is shown by the evidence, taken all together, that the crime was committed in the county where the venue is laid.

ID.—TESTIMONY OF POLICE OFFICER—IMPROPER CROSS-EXAMINATION—STATEMENT BY DECEASED.—Where in the testimony in chief of a police officer there was no allusion to the deceased, his cross-examination in reference to a statement made by the deceased in the interest of the defendant was properly disallowed.

ID.—DYING DECLARATION OF DECEASED.—If the deceased had made a dying statement favorable to the defendant, which was part of the *res gestae*, the defendant might prove it independently; but he could not prove it by improper cross-examination. He did not call the officer, as his own witness, to prove such declaration.

ID.—WITNESS FOR DEFENDANT—DECLARATION NOT SHOWN TO BE DYING OR PART OF RES GESTAE.—When a witness was called to prove a statement by the deceased after he had been placed under arrest, which was not shown to be a dying statement, or part of the *res gestae*, it was properly excluded as not appearing to be material or relevant. The mere fact that the witness heard deceased make a statement of the trouble is too indefinite to show that it was admissible or would throw any light upon the case.

ID.—INSTRUCTION AS TO MANSLAUGHTER—INVOLUNTARY MANSLAUGHTER—LAW OF SELF-DEFENSE NOT QUALIFIED.—An instruction as to manslaughter given in the language of section 192 of the Penal Code, though it might well have omitted the law of involuntary manslaughter, yet was not misleading, where such instruction was not so given as to qualify the law of self-defense, and other instructions were fully given as to the right of self-defense and the right of defendant to act on appearances.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

Wm. H. H. Hart, and Joseph A. Brown, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

COOPER, P. J.—The defendant was charged by the information with the crime of murder, and a verdict returned finding him guilty of manslaughter. He was thereupon sentenced to a term of five years in the state prison. He prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

It is claimed that the evidence is insufficient to support the verdict, and we have carefully examined the same, and in our opinion find it sufficient.

The evidence of the witness Lloyd is to the effect that the defendant upon meeting deceased, with whom he was not on good terms, called him a vile name and about the same instant aimed his umbrella at him, hitting him in the eye with it, thus inflicting the wound that caused his death; that at the time of the assault the deceased had not made any hostile demonstration or any attempt to injure defendant. Defendant's counsel, in his brief, claims that the version of the matter as given by Lloyd was improbable and in contradiction of the other testimony in the record. This was a question solely for the jury, and it is not our province to pass upon the evidence where it is conflicting and where it is sufficient in substance to support the verdict.

The evidence as to the venue is sufficient. The witnesses referred to the restaurant near which the difficulty occurred as being next to Laib's saloon on the west side of Fillmore street in the city and county of San Francisco. The deceased was taken to the Scobie Hospital in the city and county of San Francisco, where he died. It is sufficient if it is shown by the evidence, taken all together, that the crime was committed in the county where the venue is laid.

One Bell was called as a witness for the prosecution, and testified that he was a police officer, and that on the evening of the difficulty and after he had heard of it he saw the defendant. He was then cross-examined, and at near the con-

clusion of the cross-examination he was asked by defendant's counsel: "Q. Did McCarthy make any statement about he did not want to prosecute anybody—about it being his own fault?" The question was objected to as being irrelevant and incompetent and not proper cross-examination, and the court sustained the objection. The ruling was correct. The question was not proper cross-examination as the witness had not even mentioned the name of McCarthy in his direct examination. If the deceased had made a dying statement, or a statement which was part of the *res gestae*, the defendant no doubt would have been allowed to prove it, but he could not prove such a statement by a cross-examination entirely outside of any statement made by the witness in direct examination. The witness was not called by the defendant as his own witness, nor questioned in any way or manner in regard to the matter.

One Mitchell was called by the defendant as his own witness, and testified that he was a police officer; that he was present shortly after McCarthy, the deceased, had been placed under arrest by officer Bell. He was then asked if he heard deceased make any statement at the time about the encounter. The witness answered "Yes, sir." The district attorney then, after the answer had been given and was of record, objected to the question upon the ground that it was immaterial and irrelevant, and the court sustained the objection. No motion was made to strike out the answer, and it was not stricken out. No further question was asked as to the particular time of the statement, or whether it was a dying statement, or was so closely connected in time with the difficulty as to be part of the *res gestae*. The question as asked was too indefinite, and was not pointed to any fact which would show that the ruling was prejudicial. It should have been asked with sufficient statement of particulars to show that defendant was entitled to the statement. The mere fact that the witness heard deceased make a statement after the trouble is too indefinite to show that the statement was admissible or that it would throw any light upon the case. It is perfectly consistent with the question asked to conclude that the statement was a mere narrative of a past transaction. It was not shown by the question that the statement desired was contemporaneous with the transac-

tion or within so short a time afterward as to preclude the idea of deliberate design.

It is argued that the court erred in instructing the jury as follows: "Manslaughter is not murder. It is the unlawful killing of a human being without malice. It is of two kinds; voluntary, that is, upon a sudden quarrel or heat of passion; involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." The instruction is a literal copy of section 192 of the Penal Code. The portion of the section defining involuntary manslaughter might well have been omitted, but it could not have misled the jury as they were fully instructed in other portions of the charge as to the right of self-defense, and the right of a defendant to act upon appearances.

The case of *People v. Thompson*, 145 Cal. 217, [79 Pac. 435], is not in point. In that case the defendant's requested instruction related to the right of defendant to defend himself when in apparent danger of death or great bodily harm, and that "if defendant acted in self-defense from real and honest convictions as to the character of the danger induced by the existence of reasonable circumstances, he should be acquitted even though he was mistaken as to the extent of the danger." The trial court refused to give the requested instruction, but after giving it in substance added to it: "But the killing must be done with due caution and circumspection and not in a sudden quarrel or heat of passion. For if the killing, under such circumstances, was done with due caution, and circumspection, or was done in a sudden quarrel or heat of passion, then the defendant is guilty of manslaughter." The court very properly held that the effect of the instruction was to tell the jury that a defendant could not kill his adversary in self-defense unless the killing was done with due caution and circumspection, and that the giving of such instruction under the facts of that case was prejudicial error. Further, it clearly appears that the instruction was erroneous in that case, where the jury was told that if the killing was done with due caution and circumspection, or was done in a sudden quarrel or heat of passion, "then the defendant is guilty of manslaughter."

In the case at bar the definition of involuntary manslaughter was not given in connection with any particular instruction or with the right of self-defense. The jury were not told that the defendant in the killing must have acted with due caution and circumspection even if acting in self-defense.

Other instructions are criticised, but the objections to them are not sufficiently plausible to merit further discussion. The court fully and fairly instructed the jury upon every phase of the case. Their verdict was for the least offense included within the information, and recommended the defendant to the mercy of the court. The court accordingly sentenced defendant to one-half the term to which he might have been sentenced under the verdict.

The judgment and order are affirmed.

Hall, J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 13, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 13, 1910.

[Civ. No. 766. Second Appellate District.—March 16, 1910.]

E. K. FOSTER, Respondent, v. FRED W. BEAU DE ZART, Appellant.

ACTION ON NOTE—CONSIDERATION—MONEY ADVANCED TO PAY UP STOCK PURCHASED ON MARGIN—COLLATERAL SECURITY—CONTRACT NOT INVALID.—Where a note sued upon was in consideration of money advanced by plaintiff to enable defendant to pay up stock originally purchased by defendant from a broker upon margin, which was so paid up and transferred to plaintiff to secure the note, the contract as between the plaintiff and defendant was not invalid, as being prohibited by statute, and cannot be regarded as a gambling contract.

ID.—MONEY ADVANCED IN GOOD FAITH—RECOVERY NOT DEFEATED BY KNOWLEDGE OF ORIGINAL MARGINAL CONTRACT.—Plaintiff having in good faith advanced to defendant money with which to complete the contract for the purchase of the stock, recovery of such advancement could not be defeated simply because plaintiff had a

general knowledge of the marginal character of the contract as between the defendant and the broker, where there is nothing in the record indicating any irregularity or invalidity of the contract entered into between plaintiff and defendant.

ID.—NOTE PAYABLE ON DEMAND—EVIDENCE—WAIVING DEMAND BEFORE SUIT.—Where the note was payable on demand, and, in addition to the evidence of plaintiff that he demanded payment before suit, there is evidence in the record tending to show that before suit defendant refused payment of the note and demanded a return of the stock with the money he had paid on it, such action on the part of the defendant was a waiver of any demand, which is not required when it appears that it would have been unavailing.

ID.—ASSIGNMENT AND REASSIGNMENT OF NOTE.—It is held that an assignment of the note to a third party by the plaintiff, and a reassignment thereof to the plaintiff before suit, were each regularly made; and that it is sufficient to support the action that plaintiff was the owner and holder of the note when it was commenced.

ID.—ALLOWANCE OF INTEREST.—It is held that there was no error in the allowance of interest on the demand note and on a balance due thereon.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. George R. Davis, Judge.

The transcript shows that the demand note specified no interest, but that legal interest was calculated from its date, April 14, 1908, to the date of the sale of hypothecated stock, November 25, 1908, and the application of the proceeds, and legal interest was allowed on the residue to the date of judgment. Further facts are stated in the opinion of the court.

Jones & Weller, for Appellant.

H. C. Millsap, for Respondent.

ALLEN, P. J.—The action was one to recover the unpaid balance upon a promissory note executed by defendant to plaintiff. Defendant, admitting the execution of the note, alleged that there was no consideration therefor, and that the same was executed by defendant to plaintiff to secure certain margins on stocks. By way of cross-complaint, defendant set up the purchase from plaintiff by defendant of 34,000 shares

of mining stock on a margin, and that pursuant to an agreement that it would be necessary for defendant to pay additional margins from time to time, the note set out in the complaint was executed and 63,500 shares of mining stock were deposited with plaintiff as collateral thereto; that plaintiff keeps and retains said stock, notwithstanding the invalidity of the note and of the transaction and refuses to surrender the same upon demand; and he prays judgment for the value of such stock. In various other separate counts of the cross-complaint defendant sets up the payment by him to plaintiff of various sums by way of margins upon the stock transaction between them, and asks for judgment for the amount of such margin payments. Issue is tendered by the plaintiff on all the matters set out in the cross-complaint.

Upon the trial, the court found that the note was executed for a valuable consideration; that it was not executed or delivered to secure the payment of any margin or margins on stock, but, on the contrary, was executed in consideration of money loaned; that no sums by way of margin or margins were ever paid by defendant to plaintiff; that no stock or stocks was deposited as security by defendant for any margin or margins; that while the stock set forth was delivered by defendant to plaintiff as collateral security for the note, plaintiff under the terms of the note, before commencement of the action, sold the stock so hypothecated as security, and that the sum remaining as the proceeds of said sale after payment of costs of sale was \$1,365.25 and no more, which amount was duly credited upon said note; that the price at which such stock was sold was the highest market value of said stock on said date; that the stock mentioned in the cross-complaint had not been converted by plaintiff, and that a balance of \$1,771.30 remained unpaid upon said note, for which sum, with attorney's fees amounting to \$171.80, judgment was rendered. Defendant moved for a new trial, which was denied, and this appeal is prosecuted from the judgment and an order denying a new trial.

It appears from the statement that defendant had bought from one Blagge, a broker, on margin certain shares of stock and had paid to Blagge certain sums by way of margin upon such purchase, and that the amount of \$2,957.55 remained unpaid on account of the stock purchased. Plaintiff testifies that

he knew nothing of the details of the purchase, but did know in a general way that the stock had been purchased upon margins and had seen a memorandum showing the various amounts paid to Blagge; that defendant represented to plaintiff that it would be necessary for him to have the amount mentioned in the note, which was then owing to Blagge, in order to take up the stock. Plaintiff agreed with defendant that if he would deposit the stock so purchased, with certain other stock as collateral, he would advance the amount of money necessary to take up the stock from Blagge. Pursuant to this plaintiff did advance the amount of money mentioned in the promissory note, the stock was taken up and the transaction with Blagge closed. Plaintiff actually paid out the sum mentioned in the note on account of the delivery of the stock to him, plaintiff testifying that the whole transaction was in good faith and a *bona fide* loan of the amount mentioned in the promissory note to defendant to enable him thus to complete the purchase of the stock so originally purchased upon margin. From this it is claimed by appellant that the contract between plaintiff and defendant was founded on an illegal consideration, that it was a gambling contract and no recovery can be had under it; and, in this connection, he attacks the testimony of plaintiff, which is uncontradicted, as being insufficient to support the finding of the court. As to this last proposition, it is sufficient to say that there is some testimony in the record warranting the finding of the court, and the same will therefore be sustained. We are not of the opinion that, under the facts disclosed, the transaction between plaintiff and defendant is prohibited by statute, or that the same may be regarded as a gambling contract. Plaintiff having in good faith advanced to defendant money with which to complete the contract for the purchase of the stock, recovery of such advancement could not be defeated simply for the reason that plaintiff had a general knowledge of the marginal character of the contract as between defendant and the broker. There is nothing in the record indicating any irregularity or invalidity of the contract entered into between plaintiff and defendant.

The note set out in the complaint was payable on demand, and it is claimed that there is no evidence in the record showing a demand before suit was brought. There is evidence in the record, however, tending to show that before the suit was

brought Beau de Zart refused payment of the note and demanded a return of the stock with the money he had paid on it. Demand is not required when it appears that it would have been unavailing. In addition to this, plaintiff testifies that he did make a demand.

There is in the record a point sought to be made with relation to the regularity of an assignment of the note by plaintiff to one Waggy and by Waggy back to plaintiff. There is sufficient in the record to warrant the finding of the court that such assignments were made, and that plaintiff was the holder and owner of the note at the time suit was brought.

There was no error in the court rendering judgment for interest. (*O'Neil v. Magner*, 81 Cal. 631, [15 Am. St. Rep. 88, 22 Pac. 876].)

We see no prejudicial error in the record, and the judgment and order are affirmed.

Taggart, J., and Shaw, J., concurred.

[Civ. No. 708. First Appellate District.—March 17, 1910.]

WM. M. AYDELOTTE, Respondent, v. I. T. BLOOM, Appellant.

ACTION FOR LEGAL SERVICES—CONFLICT OF EVIDENCE—SUPPORT OF VERDICT.—In an action for legal services, where the testimony of the plaintiff is corroborated, and there is conflicting evidence for the defendant, the verdict for the plaintiff is sufficiently sustained, and this court will not interfere therewith.

ID.—PLEADING—REASONABLE VALUE OF SERVICES—EVIDENCE OF RETAINING FEE.—Under a general complaint to recover the reasonable value of plaintiff's services as an attorney at law, evidence is admissible, without special pleading thereof, to prove the amount of a reasonable retaining fee.

ID.—RETAINER PART OF CAUSE OF ACTION.—Where an action is brought to recover the value of an attorney's services, the retainer, if not paid, constitutes part of the plaintiff's cause of action; and it is not necessary to set forth the items of the account in the complaint. It is sufficient to state the facts constituting the cause of action in ordinary and concise language.

Id.—BILL OF PARTICULARS.—Where, upon a demand for a bill of particulars, one was furnished setting forth detailed items for disbursements, and one lumping charge for the whole of the legal services, and no further bill of particulars was demanded, it was competent in proving the value of the services to prove the amount of a reasonable retaining fee.

APPEAL from an order of the Superior Court of Santa Cruz County, denying a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Hugh R. Osborn, for Appellant.

Wm. M. Aydelotte, and A. H. Jarman, for Respondent.

KERRIGAN, J.—This is an action to recover the reasonable value of services rendered as an attorney at law. The case was tried with a jury, and in accordance with its verdict a judgment was entered in favor of the plaintiff and against the defendant for the sum of \$600. This appeal is from an order denying defendant's motion for a new trial.

The evidence upon both sides presented has been read and considered. Very briefly the facts are as follows: The plaintiff testified that he rendered the defendant certain services as an attorney at law; that the reasonable compensation for such services was \$1,000. He rendered a bill, however, for \$750, and sued for this amount. His testimony as to the services rendered and as to their value was corroborated. The defendant did not dispute that the plaintiff had rendered the services, but claimed that they were performed, not as an attorney at law but as an expert bookkeeper, and that they were not so extensive as claimed by plaintiff, and that the reasonable value of the same was \$265, and introduced evidence to that effect.

It thus appears that there is a conflict in the evidence; and as there is evidence to sustain the verdict of the jury, this court, as has been repeatedly held, will not interfere. (*Berger v. Horlock*, 10 Cal. 352, [101 Pac. 918]; *Ernest v. McAuley*, 155 Cal. 739, [102 Pac. 924].) In the case of *Long v. Saufley*, 89 Cal. 437, [26 Pac. 902], it was said: "This court has repeatedly held that the decision of the trial court upon conflicting evidence is conclusive, and that when that court upon a

motion for a new trial has refused to set aside such decision, this court will not reverse or even review its action."

One of plaintiff's witnesses, an attorney at law, in testifying as to what in his opinion plaintiff's services were reasonably worth, said: "I should say he should be entitled to a retainer of \$500, and his services should be worth in addition to that from \$700 or \$750 to \$1,000. I should say that he should have \$1,250 for those services including the retainer." Defendant objected to that part of the answer referring to the retainer, and now claims that as the plaintiff did not sue for or demand a retainer the testimony was erroneously admitted. It is true that the plaintiff does not in his complaint in terms mention a retaining fee, but merely alleges that the amount sought to be recovered is the reasonable value of the services rendered; but it has been decided that upon such an allegation an attorney may in proving such value include therein the amount of a reasonable retaining fee. (*Knight v. Russ*, 77 Cal. 410, [19 Pac. 698]; *Roche v. Baldwin*, 143 Cal. 186, [76 Pac. 956].) In the former case the court said: "When an action is brought to recover the value of an attorney's services the retainer, it not having been paid, constitutes a part of the plaintiff's cause of action, but it is not necessary to set forth the items of the account in the complaint. It is sufficient to state the facts constituting the cause of action in ordinary and concise language, and if the defendant desires further particulars, he may call for them, and they must be given to him within a reasonable time. (Code Civ. Proc., secs. 426, 454.) At the trial, if an issue has been tendered as to the value of the services, their value must be proved, and that will include the value of the retainer." In the case at bar, on the demand of defendant a bill of particulars was furnished, which included various items of disbursements, and one item detailing the various services rendered, and making one lumping charge for the whole of those services. No further bill of particulars was called for. It was in proving the value of the services detailed in this last-mentioned item that the testimony was received as to the amount of a reasonable retaining fee; and we think, under the authority of the two cases last cited, that the evidence was properly received.

The order appealed from is affirmed.

Hall, J., and Cooper, P. J., concurred.

[Civ. No. 750. First Appellate District.—March 17, 1910.]

**GEORGE FRANK COMPANY, a Corporation, Appellant,
v. LEOPOLD & FERRON COMPANY, a Corporation,
Respondent.**

**JUDGMENT AGAINST FOREIGN CORPORATION—VOID SERVICE OF SUMMONS
ON SECRETARY OF STATE—VACATION WITHIN REASONABLE TIME.—**

The service of summons against a foreign corporation not doing business in this state cannot be made upon the Secretary of State, and a judgment against it by default, based upon such service, is void in fact, for want of jurisdiction over the person of the defendant, and may be vacated upon affidavit showing the facts within a reasonable time after the entry of the judgment.

Id.—JUDGMENT VOID IN FACT—WANT OF JURISDICTION OF PERSON—

REASONABLE TIME NOT LIMITED BY CODE.—A motion to vacate a judgment not void upon the face of the judgment-roll, but void in fact only for want of jurisdiction of the person of the defendant, is not limited as to a reasonable time within which to notice the same, by the terms of section 473 of the Code of Civil Procedure. The right to have a void judgment vacated exists independent of, and outside of, any statutory provision.

Id.—LIMIT OF TIME TO BE DETERMINED BY TRIAL COURT.—

While the court may vacate a judgment void upon its face at any time, and can only vacate a judgment merely void in fact, for want of jurisdiction over the defendant, within a reasonable time, yet the limit of such reasonable time, in the absence of a statutory provision, should be largely left to the determination of the trial court.

Id.—NOTICE SPECIFYING ENTRY OF JUDGMENT—SIX MONTHS—PRE-

SUMPTION—BURDEN OF PROOF.—Where the notice of the motion to vacate the judgment specified its *entry* within six months prior thereto, and the record shows nothing to the contrary, it must be presumed against the appellant, upon whom the burden of showing error lies, and in support of the order vacating the judgment, that the entry of the judgment was within six months preceding such notice.

Id.—RENDITION OF JUDGMENT—LAPSE OF SIX MONTHS AND ONE DAY

—POWER OF COURT.—Where the judgment by default was rendered against the defendant by the judge signing the same, and the filing thereof with the clerk six months and one day prior to the notice of motion to vacate the judgment, as being void in fact, it cannot be held that such lapse of time after the rendition of the judgment, as distinguished from its entry, was unreasonable, or that the court had no power, under such circum-

stances, to vacate such judgment, upon proof *dehors* the record, that the court never obtained jurisdiction over the defendant.

APPEAL from an order of the Superior Court of Santa Clara County, vacating a judgment by default. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

Will M. Beggs, J. S. Partridge, and R. C. McComish, for Appellant.

Campbell, Metson, Drew, Oatman & Mackenzie, for Respondent.

HALL, J.—This is an appeal from an order vacating and setting aside a default judgment entered against defendant as damages for an unlawful and malicious attachment.

The action is purely a personal one, and was brought in October, 1906. The defendant is a foreign corporation, organized and existing under the laws of the state of Illinois. It had never filed in the office of the Secretary of State of this state a copy of its articles of incorporation, or a designation of an agent upon whom process might be served, as is required by the statute of this state of all foreign corporations doing business in the state. (Civ. Code, secs. 405, 408.)

Service of summons was made upon defendant by serving a copy of the summons and complaint upon the Secretary of State.

Upon the sixteenth day of November, 1906, a judgment, upon default, against defendant for the sum of \$25,000 was signed by the judge of the court and filed with the clerk. On the seventeenth day of May, 1907, just six months and one day after the rendition of the judgment, the defendant specially appeared in the action for the purpose of its motion only, and gave and filed a notice of motion to vacate and set aside said judgment upon the ground that the court never obtained jurisdiction of the defendant, in that no service of summons, as required by law, had been made on defendant and that it had never appeared in said action or submitted itself to the jurisdiction of the court. Upon the hearing the court granted the motion, and it is from this order that the plaintiff has appealed. At the hearing the court

allowed defendant to read in evidence an affidavit served with the notice and other affidavits replying to affidavits read by plaintiff. From the affidavits read by defendant it appears that defendant was not at the time of bringing the action, and had not for over a year prior thereto, or since, been engaged in business in the state of California, nor had it at that time, nor for over a year prior thereto, nor since, any officer, managing or business agent, cashier or secretary, officer, representative, or agent in said state of California.

In other words, the facts disclosed by these affidavits show that service of summons on this defendant could not be had in this action by service of such summons on the Secretary of State, and in consequence the judgment is void. We do not understand that this is disputed by appellant. Its contention is that the motion came too late to permit the use of proof *aliunde* the judgment-roll to show its invalidity for want of jurisdiction over the defendant, in that the motion was made more than six months after the judgment was taken. The record does not disclose when the judgment was entered other than the notice of the motion recited that the judgment was entered on the seventeenth day of November, 1906; but if the date of its entry be important, we would assume as against an appellant, upon whom the burden of showing error lies, and in support of the order of the trial court, that the entry was within six months preceding the notice of motion.

The fallacy of appellant's position lies in the assumption that the time within which a motion to set aside a judgment void in fact, but not so appearing upon the judgment-roll, is limited by section 473, Code of Civil Procedure. This motion is not made under this section at all. The right to have a void judgment vacated and set aside exists independent of and outside of any statutory provision. (*Waller v. Weston*, 125 Cal. 201, [57 Pac. 892]; *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, [33 Am. St. Rep. 198, 32 Pac. 452]; *Mott Iron Works v. West Coast Plumbing Co.*, 113 Cal. 341, [45 Pac. 683].) Where the judgment appears to be void upon its face, that is, by inspection of the judgment-roll, it may be vacated upon motion at any time; but where its invalidity must be shown by extrinsic proof, it is well settled that such motion can only be entertained when made within a rea-

sonable time. In this connection appellant insists that it has been settled in this state by authoritative decisions that such reasonable time cannot exceed the maximum time allowed for the motions authorized by section 473, Code of Civil Procedure, and that the time allowed by that section cannot exceed six months from the *rendition* of the judgment as contradistinguished from the *entry* thereof.

We have examined all the cases cited by appellant as well as all those cited by respondent upon this point, and we are of the opinion that the result of the decisions is that a motion to vacate a void judgment, not appearing to be such upon its face, must be made within a reasonable time. So much has been authoritatively settled. But in none of the cases has it been decided whether the time shall run from the rendition of the judgment or from the entry thereof. In none of the cases has it been necessary to fix precisely what is a reasonable time. It being established that the motion may be made within a reasonable time, it would seem to follow on principle that what is a reasonable time, in the absence of a statutory limitation, should be largely left to the determination of the trial court. We have just said that in none of these cases has it been necessary to fix precisely what is a reasonable time for such a motion as this. *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, [33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452], may be considered a leading case in this state upon the right to vacate a judgment, void in fact, but not so appearing upon the record, by motion. The right to vacate such a judgment upon motion at all was attacked, and it was held that the right existed, but must be exercised within a reasonable time. It was there said: "Under our present system, terms of court are abolished, and a motion to set aside a judgment would have to be made within a reasonable time; and perhaps, following the analogy of section 473, six months might be considered the extent of a reasonable time for the motion; but however that may be, there is no question in the case at bar as to reasonable time because the motion was made within ten days after the judgment. . . . We hold, therefore, that when a nonresident has not been personally served within the state, the court has power, within a reasonable time, when it finds that it has been deceived by a false return of such service within the state, to quash the

service of summons and vacate the judgment. This is as broad a statement of the rule as the facts of this case require."

It is thus apparent that it was only decided in that case as to the time of such motion that it must be made within a reasonable time, and that ten days was such reasonable time. The suggestion that the time fixed by section 473, Code of Civil Procedure, should be adopted cannot mean anything more than that approximately such time should not be exceeded, in view of the fact that it laid down authoritatively that such motion may be made within a reasonable time, and in view of the rule that what is a reasonable time, in the absence of a statutory limitation, is a question largely within the discretion of the trial court.

In *People v. Temple*, 103 Cal. 453, [37 Pac. 415], cited by appellant, the motion was made more than twelve years after the judgment was entered, and it was held that it came too late. It was there said "that a judgment which is in fact void for want of jurisdiction over the person of the defendant, but where its invalidity does not appear from the judgment-roll, may be set aside upon motion within a reasonable time after its *entry*." (Italics are ours.) The court further said: "And what is a reasonable time within which a motion may be made to set aside a judgment, not void upon its face, must depend somewhat upon the circumstances of each particular case, and is not definitely determined further than that it will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure." This reference to what has been "determined," so far as we are advised, has no greater justification than the suggestion concerning the effect of section 473, in *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, [33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452]. No such point was there definitely determined or determined at all.

Whether or not the exact time limited for motions under section 473, Code of Civil Procedure, was the maximum limit for a motion to vacate a judgment void *dehors* the record was not involved in the Temple case. The gist of the decision is contained in the concluding paragraph, which is, "The judgment was not void upon its face, and could not, upon that ground, be set aside on motion. The motion was made more than *twelve years after the judgment was entered*, and was

not within a reasonable time. The court had no power, therefore, to grant the motion, and its action in doing so must be held void and of no effect.” (Italics are ours.)

When this case is carefully read in the light of its facts it will be seen to only authoritatively decide that such a motion as was there involved must be made within a reasonable time, and that twelve years after the *entry* of judgment is not a reasonable time.

People v. Harrison, 107 Cal. 541, [40 Pac. 956], cited by appellant, involved rights of conflicting purchasers of state lands. Incidental reference is made to an order vacating a judgment not void upon the record, made three years after the rendition of the judgment, and the Temple case is cited as determining that such a motion must be made within six months after the rendition of the judgment. But all that was said on this subject is *obiter*, as the case was decided upon another point and in favor of the party relying on the order.

People v. Norris, 144 Cal. 422, [77 Pac. 998], also cited by appellant, decides that on a motion made six years after judgment, evidence *dehors* the record cannot be used to prove the invalidity of the judgment.

On the other hand, there are expressions in cases to the effect that the time runs from the *entry* of the judgment. But in none of the cases was any point being made as to whether or not the time should be counted from the *rendition* or *entry* of the judgment.

So, too, in none of the cases cited on either side was it important for the court to fix accurately what should be the maximum limit for a reasonable time within which a motion to vacate a judgment, void in fact but not so appearing on the record, must be made. In no case did the time involved approximate near to six months, either from the rendition or entry of the judgment. The fundamental rule recognized in all the cases is that such motion must be made within a reasonable time. That is as much as has been authoritatively decided.

The section of the code relied on by appellant does not deal with the matter of vacating void judgments at all.

In the state of the authorities on the subject we are not prepared to say that a motion made six months and one day after the rendition of a judgment, void in fact, is not made

within a reasonable time, or that the court had no power under such circumstances to vacate such judgment upon proof *dehors* the record that the court never obtained jurisdiction over the person of the defendant.

The order is affirmed.

Kerrigan, J., and Cooper, P. J., concurred.

[Civ. No. 795. First Appellate District.—March 17, 1910.]

CALIFORNIA PINE BOX AND LUMBER COMPANY, a Corporation, Petitioner, v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, and E. P. MOGAN, Judge of Department Seven Thereof, Respondents.

GENERAL APPEARANCE OF FOREIGN CORPORATION DEFENDANT—PROCURING STIPULATION AND ORDER EXTENDING TIME TO ANSWER.—A foreign corporation defendant to an action makes a general appearance by written request by its attorney for a stipulation from plaintiff's attorneys extending time to answer, which was granted, and by procuring through such attorney an order of court, upon affidavit, extending time in which to answer, there being nothing in the request, stipulation, affidavit, or order to indicate that the appearance was intended to be special.

Id.—EFFECT OF GENERAL APPEARANCE.—A general appearance by a defendant waives all question as to the service of process, and is equivalent to personal service.

Id.—DEFAULT OF DEFENDANT—DUTY OF COURT—ORDER QUASHING SERVICE OF SUMMONS.—The defendant having appeared and made default, it was the duty of the court to enter the default of the defendant, which duty cannot be excused on the ground that on motion of the defendant, the court ordered the service of the summons to be quashed, the service of summons having been waived by defendant.

Id.—MANDAMUS.—Where the facts are undisputed, and the law establishes the right of a party to an order, or to the relief which the court has refused, *mandamus* will lie; and where, as in this case, it is the duty of the court to enter the default of the defendant, which it has refused to do, owing to a misconception of the law, *mandamus* will lie to compel the court to discharge its duty by entering the default of the defendant.

Id.—ABSENCE OF LEGAL REMEDY OF PETITIONER.—It cannot be said that the petitioner for the writ in this case has a plain, speedy and adequate remedy in the ordinary course of the law. There is no judgment or order from which an appeal will lie; and under the ruling of the court, petitioner cannot proceed, although the defendant has appeared and submitted itself to the jurisdiction of the court.

APPLICATION for writ of mandate to the Superior Court of the City and County of San Francisco. E. P. Mogan, Judge.

The facts are stated in the opinion of the court.

Joseph C. Meyerstein, for Petitioner.

W. T. Phipps, and Percy E. Towne, for Respondents.

COOPER, P. J.—This is an application for a writ of mandate to compel the superior court of the city and county of San Francisco and Honorable E. P. Mogan, one of the judges thereof, to make an order, directing the clerk of said court in the department presided over by such judge to enter the default of the defendant in an action pending in said court, entitled "California Pine Box & Lumber Co., a corporation, Plaintiff, vs. Des Moines Casket Company, a corporation, Defendant."

The facts of the case are substantially as follows: In October, 1909, the petitioner commenced an action in said court against said Des Moines Casket Company as defendant, to recover upon an alleged express contract for goods sold and delivered by the plaintiff therein to said defendant. The defendant was a foreign corporation, existing and doing business under the laws of the state of Iowa, and had no place of business in the state of California, and no agent upon whom summons could be served. A summons was duly issued and attempted to be served by personally delivering the same to one Antes, the president of said defendant, who was then temporarily in the state of California on business, but not engaged in any business in connection with the said corporation. After the summons had been left with said Antes, and on November 1, 1909, W. T. Phipps, an attorney at law, wrote to the plaintiff's attorneys in said action inclosing a

stipulation, and requesting that it be signed, which letter is as follows:

“In the two cases, one of the *California Pine Box & Lumber Company v. Des Moines Casket Company*, and the other *California Pine Box & Lumber Company v. Wichita Casket Company*, in which you are attorneys for plaintiff, I wish you to give me the inclosed stipulation extending time for answer. The president of these two companies has not yet got back from his recent trip to this coast, and I want a report from him before I can put in an answer. If this extension is granted I hope to avoid the necessity of putting in any demurrer, and I think time will be saved by granting it.

Yours respectfully,

“W. T. PHIPPS.”

In answer to this letter the attorneys for the plaintiff signed and inclosed a stipulation in said cause, which is as follows:

“It is hereby stipulated that the time for answering in the above case shall be and is hereby extended to and including the 20th day of November, 1909. This stipulation shall be effective without being filed.

“J. C. MEYERSTEIN and

“J. V. B. FILIPPINI,

“Attorneys for Plaintiff.”

Afterward, on the seventeenth day of November, 1909, said Phipps made an affidavit, in which he stated and set forth that he was attorney for the defendant in said action; that the summons was served upon the president of the defendant while he was temporarily traveling in the state of California; that said president had returned to the state of Iowa, and was the only person in position to furnish affiant “with the necessary data from which to prepare and file the answer in the above-entitled matter.” The affidavit further stated, “That said president of said defendant has not as yet had sufficient time in which to furnish affiant with said data, and it is therefore necessary that affiant, for the benefit of said defendant, get an extension of time herein for answering or demurring to said complaint. That defendant’s time for answering or demurring will, unless extended, expire on November 20, 1909. Wherefore affiant prays that said court make an order ex-

tending the time for answer or demurrer herein, to and including December 20th, 1909."

Upon the above affidavit being so filed in said court by said attorney for the defendant, and at his request, the court and the said judge thereof made an order extending the time for said defendant to demur or answer to and including the twentieth day of December, 1909, and no other or further extension of time has been granted by stipulation or otherwise.

After the attorney for said defendant had so procured the stipulation as aforesaid, and filed the affidavit as hereinbefore stated, on which he procured the order of court giving him to and including December 20, 1909, in which to answer or demur, and on December 3, 1909, he made a motion in said court in said cause for an order setting aside the attempted service of summons therein, upon the ground that it had not been served upon any person upon whom service could be legally made under the laws of California. The said court thereafter, on the seventh day of December, 1909, made an order granting said motion and setting aside and quashing the said service of summons. The defendant in said action has filed no pleading or demurrer therein. Thereafter upon due notice petitioner, on the seventh day of January, 1910, made a motion for an order directing the clerk of the said court to enter the default of the said defendant, and the court thereupon made an order denying said motion, and refusing to order the clerk of said court to enter the default of said defendant, holding that it had no jurisdiction of defendant. Thereafter on the tenth day of February, 1910, the petitioner applied to the clerk of said court for entry of default against defendant, and the clerk, in view of the order so made by the court, refused to enter the same.

The first question for determination here is as to whether or not the defendant, by reason of the facts above set forth, appeared in the action.

The judge of the superior court concluded that the defendant had not appeared, and that the court had no jurisdiction of it, and no doubt based its order denying the motion for entry of default upon this ground. The question as to the service of the summons and the order setting aside the same may be eliminated, for the reason that if the facts ap-

pearing of record show an appearance as a matter of law, it was the duty of the court to order the entry of default.

It is elementary that a general appearance by a defendant waives all question as to the service of process, and is equivalent to personal service. An appearance is generally defined as the formal proceeding by which a defendant submits himself to the jurisdiction of the court. Our code provides (Code Civ. Proc., sec. 1014) that a "defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of an appearance for him." In this case the question is, Did Phipps give petitioner notice of appearance for the defendant?

In our opinion he did. When he wrote to plaintiff's attorneys and procured a stipulation giving more time to answer or demur he gave written notice of his appearance. He stated that he hoped to avoid the necessity of putting in a demurrer and that time would be saved by the stipulation. This was written information to the plaintiff's attorneys giving them notice that Phipps was the attorney for the defendant. Plaintiff's attorneys acted upon the notice when they signed and returned the desired stipulation. Defendant's attorney then made an affidavit, entitled in the court and cause, for the purpose of procuring the affirmative action of the court in giving it further time. This affidavit was filed, and the court made an order granting the further time. There was nothing in the letter, stipulation, affidavit, or order made by the court as to a special appearance. The court could not have granted the defendant an extension of time in which to plead unless the defendant was before the court. In our opinion the defendant appeared in said action, and comes within the reason and principle of the ruling in *Cooper v. Gordon*, 125 Cal. 296, [57 Pac. 1006], and *Roth v. Superior Court*, 147 Cal. 604, [82 Pac. 246].

The next question is as to whether or not the writ of mandate will lie to compel the court to make a particular order.

It is conceded that the writ will not lie to control the discretion of the court where the facts are such that the court may use its discretion. In many cases the discretion exercised by the trial court is conclusive, particularly where the evidence is conflicting; but the rule is now more liberally

extended in regard to the writ of mandate and its use to control judicial action and even judicial discretion when such discretion has been abused.

Where the facts are undisputed and the law establishes the right of a party to an order or to the relief which the court has refused, the writ will lie.

Now, in this case it is the law that when defendant's time for answering or demurring expired, plaintiff was entitled to have its default entered. It was the duty of the court under the law to order the entry of such default, and the denial of the order is a refusal to perform a duty.

In *Wood on Mandamus*, page 48, it is stated: "The rule is that a mandamus will issue to an inferior court to compel the performance of an official duty, to which a party is clearly entitled and which is refused to him, when no other effectual remedy exists, and to compel a judicial officer to perform an act which it is his imperative duty to perform, and with reference to the *manner* of the performance of which he has no reasonable discretion."

In *Temple v. Superior Court*, 70 Cal. 211, [11 Pac. 699], the petitioner sought a writ of mandate to compel the superior court to hear a contempt proceeding which it had refused to do, and the supreme court said: "Under such circumstances the court cannot, by holding without reason that it has no jurisdiction of the proceeding divest itself of jurisdiction, and avoid the duty of hearing and determining it."

In *Johnston v. Superior Court*, 105 Cal. 666, [39 Pac. 36], the superior court being satisfied that due notice to creditors had not been given, ordered additional notice to be given, and refused to make an order that due notice to creditors had been given. Upon application for a writ of mandate to compel the court to make its decree, showing that due notice had been given, the facts were reviewed, and a writ of mandate was issued, directing the court to make such decree.

In *Hensley v. Superior Court*, 111 Cal. 541, [44 Pac. 232], it appeared that the court had refused to make an order or decree of due notice to creditors upon the ground that the order of notice to creditors was not in conformity with the law. The supreme court held that it was, and directed the writ to issue, and in the opinion said: "Where, as here, the law affixes a right to specific relief from certain facts, and

there is no question made as to the existence of such facts, the court has no discretion to refuse the relief. In such a case the limit of the discretionary power of the court has been reached, and nothing but a clear duty remains; and if the relief is refused, and there is, as in this instance, no appeal or other plain, speedy and adequate remedy, mandamus will lie to compel it."

For a very clear discussion of the law on this subject see the opinion of the supreme court in the late case of *Inglis v. Hoppin et al.*, 156 Cal. 483, [105 Pac. 582]. It was there said by Mr. Justice Henshaw in his usually clear style: "While of course it is the general rule that mandamus will not lie to control the discretion of a court or officer, meaning by that that it will not lie to force the exercise of discretion in a particular manner, the above cases abundantly show that mandamus will lie to correct abuses of discretion, and will lie to force a particular action by the inferior tribunal or officer, when the law clearly establishes the petitioner's right to such action."

It cannot be said that petitioner in this case has a plain, speedy and adequate remedy in the ordinary course of law. He cannot appeal, as there is no judgment or order from which an appeal will lie. Under the ruling of the superior court he cannot proceed, although the defendant has appeared and submitted itself to the jurisdiction of the court. The court, having jurisdiction, holds that it has not, and refuses further relief in the cause.

What we have said in this opinion is not to be understood as precluding the court from hearing an application by the defendant to be relieved of the default upon a proper showing.

Let the writ issue as prayed.

Hall, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 16, 1910.

[Civ. No. 654. Third Appellate District.—March 21, 1910.]

CHARLES E. SACCHI, Respondent, v. BAYSIDE LUMBER COMPANY, Appellant.

NEGLIGENCE—MOVING OF TIMBER JAM—INJURY TO PLAINTIFF'S LEASEHOLD—SUPPORT OF VERDICT.—In an action for damages to plaintiff's leasehold alleged to have resulted from defendant's negligence in moving an immense timber jam existing in a stream above plaintiff's property, so as to cause it to break a dike on plaintiff's land, and causing a flooding thereof with debris from the stream, to the destruction of a great part of plaintiff's grazing land, and to the serious injury of his dairy business, it is held that a verdict for damages to plaintiff's leasehold from defendant's negligence in the sum of \$3,500 was fully warranted by the evidence.

ID.—QUESTIONS FOR JURY—DISPUTE AS TO CAUSE OF DAMAGE—EFFECT OF VERDICT.—The questions whether the damage was caused by the logging operations of the defendant, negligently conducted, as claimed by plaintiff, or was caused by the operations of a rock quarry, as claimed by defendant, were for the jury to determine. The verdict for the plaintiff is indubitable evidence that the damage was the direct result of defendant's negligence.

ID.—DISPUTE AS TO OPERATIONS BY INDEPENDENT CONTRACTORS OR BY DEFENDANT'S AGENTS—SUBMISSION TO JURY.—The court properly submitted to the jury the question whether persons receiving a fixed compensation for their services were independent contractors or were agents acting under the supervision of the defendant, where there is a dispute and conflicting evidence on that subject, and the verdict of the jury for the plaintiff is conclusive that they were agents and not independent contractors.

ID.—NATURAL RESULT OF OPERATIONS—KNOWLEDGE AND ANTICIPATION BY DEFENDANT.—The natural result of the operations of the defendant in removing the original jam from its position above plaintiff's land must necessarily have been known to, and anticipated by, defendant and its officers.

ID.—VERDICT CONCLUSIVE ON QUESTIONS OF FACT.—The verdict of the jury is conclusive on all questions of fact submitted thereto by the court or involved in the case.

ID.—EVIDENCE BEARING ON DAMAGES—PRODUCTION OF LAND DURING PREVIOUS YEAR.—Evidence as to what the land leased by plaintiff produced in the year previous to that in which the damage was sustained was admissible as tending to show the adaptability of the land damaged to the cultivation of crops growing thereon,

and its capacity for producing crops in such quantity as was essential to the dairy business.

ID.—DIMINISHED VALUE OF LEASEHOLD—RENTAL VALUE OF DAMAGED LAND—COST OF RESTORATION.—Evidence was admissible to show the diminished value of the leasehold during the remainder of the term by reason of the damage caused to the land from defendant's negligence, and, to that end, to prove the rental value of the damaged land per acre, and the cost of restoring the land to the condition in which it was when submerged.

ID.—OTHER ELEMENTS OF DAMAGE—DAIRY COWS—BUTTER FAT—COST OF KEEPING ON OTHER LAND.—Evidence of the number of dairy cows kept by plaintiff, of the quantity of butter fat produced from them in the previous year, and of the cost of maintaining them on other land which he was compelled to rent for that purpose, was admissible on the question of damages.

ID.—ALL PROOFS OF DAMAGE TO BE CONSIDERED TOGETHER.—All of the proofs relating to the questions of damages are to be considered together, as furnishing as fair a foundation as can be shown or approximately laid to arrive at a just and reasonable assessment of damages.

ID.—DAMAGES PROVED NOT REMOTE OR SPECULATIVE—INJURY TO PARTICULAR CROP AND BUSINESS—LOSS OF PROSPECTIVE PROFITS.—The damages proved are not remote or speculative. It is always admissible to prove that land damaged is peculiarly adapted to a particular kind of crop, and what it is capable, under ordinary circumstances, of growing as to kind and quality, and to prove and recover the loss of prospective profits which would naturally flow from a business damaged, had such business not been destroyed or impaired, so as to obstruct its prosecution in the ordinary way in which it has always been conducted.

ID.—MEASURE OF DAMAGES—DAMAGE LIKELY TO RESULT FROM TORT.—The damages which, in the ordinary course of things, would be likely to result from a wrongful or tortious injury to property are the basis or measure of compensation to which the plaintiff is entitled for the injury so inflicted.

ID.—INSTRUCTIONS—ACTION UPON REQUESTS.—*Held*, that, considering the entire charge of the court, every principle of law applicable to the issues and evidence was correctly declared and explained to the jury with clearness; that correct instructions requested and disallowed were otherwise given in the charges, and that, where requests were modified, it was either because the part modified was either inapplicable or incorrectly stated, or announced elsewhere.

ID.—INAPPLICABLE REQUEST—INJURIES CAUSED BY "ACT OF GOD."—Where there was no evidence to justify a requested instruction that if the jury found that the injuries to plaintiff's property

were caused by the "act of God," defendant would not be liable, it was properly disallowed.

ID.—IMPROPER REQUEST—BRIDGES FOR PASSAGE OF COWS—LOSS—LEASEHOLD PROPERTY—DUTY OF REPAIR.—The court properly disallowed a requested instruction that if the bridges spanning small sloughs on plaintiff's land, for the passage of his cows, were part of the realty, plaintiff could not recover for their destruction, where it appears that such bridges were a part of plaintiff's leasehold, and that it was plaintiff's duty to keep the bridges and other fixtures on the land leased in repair.

ID.—MISLEADING REQUESTS—GENERAL RIGHT TO PROTECT PROPERTY.—Where the court had given a proper instruction as to the right of defendant to protect its railroad trestle from injury or destruction by removing the jam therefrom with ordinary care, and with a view to the rights of others below, the court properly refused general and indefinite instructions as to the right of any person to protect his property with the use of ordinary care, which were calculated to mislead the jury that the big jam was wholly disturbed to protect property, when in truth the sole purpose thereof was to utilize part of the timber composing it, and it appears probable that if the body of the jam had been undisturbed, the winter rains would have carried the whole through the stream into Humboldt bay without injury to plaintiff's leasehold.

ID.—VERDICT NOT EXCESSIVE—REVIEW UPON APPEAL.—*Held*, that the face of the record does not show that the verdict was excessive, but shows that the evidence amply justified the amount of damages awarded. The appellate court is not warranted in substituting its judgment for that of the jury and of the trial judge.

APPEAL from a judgment of the Superior Court of Humboldt County, and from an order denying a new trial. G. W. Hunter, Judge.

The facts are stated in the opinion of the court.

Denver Sevier, for Appellant.

Otto C. Gregor, for Respondent.

HART, J.—This is an action for damages for injuries alleged to have been inflicted upon the leasehold of plaintiff through the negligence of the defendant.

The complaint asked for damages in the sum of \$5,200, but the jury by whom the cause was tried assessed the damages

at the sum of \$3,500, for which amount the court subsequently caused judgment to be entered in favor of plaintiff.

This appeal is from the judgment so entered and the order denying defendant's motion for a new trial.

The injuries alleged to have been sustained to plaintiff's property were the result of the overflow upon his land of the water from Jacoby creek, in Humboldt county, and it is charged that said overflow and the consequent submerging and damaging of plaintiff's land was caused by the negligent acts of the defendant.

The defendant is a corporation, and the purpose for which it was organized as such was to carry on and conduct the logging and lumbering business, in which, for many years prior to the institution of this action, it and its predecessor, the Bayside Mill and Lumber Company, were engaged on Jacoby creek, in Humboldt county.

The plaintiff, at the time the injuries complained of were sustained, and for some years prior thereto, was the lessee and in the possession of something over three hundred acres of land bordering on said Jacoby creek, and through and over the southwesterly portion of which the channel of said creek passed. Said creek is described in the complaint as "a natural watercourse in said Humboldt county, about twelve miles in length, and flowing in a northwesterly direction and emptying into the northern portion of Humboldt bay . . . ; that said Jacoby creek is a stream amply sufficient in width, size and flow of water to carry and bear along and float in its waters to said Humboldt bay, while flowing along from its source to said Humboldt bay, all natural debris, refuse and drift, if unrestrained, which would naturally float or fall into and be carried along by the waters thereof and the natural current of said Jacoby creek."

The complaint further states that, for more than a year prior to the time at which the alleged injuries were inflicted upon plaintiff's leasehold, the said land of plaintiff was "protected by a good and substantial dike and embankment theretofore constructed and built on and along said bank by said plaintiff and his said lessors, and that at the said time of said hereinafter-mentioned overflow of said Jacoby creek, and for a year or more prior thereto, said dike and embankment was of sufficient width, height and strength to fully

protect, and the same would have fully protected, and did fully protect, said land leased to said plaintiff as aforesaid from and against any encroachment of or overflow by the salt tide waters of said Humboldt bay and the waters of said Jacoby creek in the natural rise and fall and flow of said waters of said Humboldt bay and of said Jacoby creek."

Said land so under lease to plaintiff, it is alleged, was, prior to and at the time of the infliction of the damage complained of, improved and valuable farming and dairy land, "and prior thereto had been properly seeded to tame grasses by said plaintiff and was then valuable grazing land and producing an abundant stand of tame grasses for pasturing purposes, and was then used by said plaintiff as dairy and grazing land."

It is averred that, for more than six years prior to the twenty-seventh day of January, 1905, the predecessor of defendant, Bayside Mill and Lumber Company, a corporation, was the owner and in the possession of a large tract of land situated on both sides of Jacoby creek "and lying along said creek, up said creek, from and above" the land leased to plaintiff; that said corporation was for many years engaged in cutting and logging the timber standing on its said tract of land and removing the same therefrom; that, "while said timber was being so cut and removed from said tract of land, and by reason thereof, great quantities of debris and refuse logs, timber and material were worked up from said timber so cut, logged and removed as aforesaid, and remained and were left upon said tract of land, and thereby accumulated thereon and were placed in and left upon, along and adjacent to the banks of said Jacoby creek and in such manner that said debris and refuse logs, timber and material, placed in and left upon, along and adjacent to said banks of Jacoby creek, as aforesaid, would be and were, prior to the second day of January, 1905, in large and excessive quantities carried and floated by the elements and the natural flow and current of said Jacoby creek into the waters of said Jacoby creek."

It is further shown by the complaint that said corporation, in order to restrain and keep said debris, drift, refuse logs and timber, etc., from being carried farther down said creek, and to thereby prevent the bed of said creek from being

filled therewith and the water therein from running over and inundating the lands of lower riparian owners, caused to be formed out of said natural debris, drift, logs, etc., "an immense and compact jam and obstruction in and across said Jacoby creek and which extended up, in and along said Jacoby creek for a distance of four hundred yards or thereabouts, and completely filled and obstructed said Jacoby creek for said distance from bank to bank, and, as so detained and restrained by said Bayside Mill and Lumber Company, . . . said jam and obstruction was then and there so compact in character and so fastened and secured by said Bayside Mill and Lumber Company, . . . that said debris and refuse logs, timber and material and natural debris contributing and forming the same would not be, and no part thereof would be, thereafter carried down stream by the current and waters of said Jacoby creek, and that said jam and obstruction, if not disturbed or interfered with or loosened or opened up by any person, would thereafter permanently remain intact and in the same place and condition as the same was then in."

The complaint discloses that, on the twenty-seventh day of January, 1905, the defendant became the owner of all the property and rights of the Bayside Mill and Lumber Company heretofore mentioned, and thereafter, as stated, continued to carry on and conduct the logging and lumbering business on said Jacoby creek.

It is charged that the defendant, after succeeding to the business of said Bayside Mill and Lumber Company, negligently caused the "big jam" to be so disturbed and loosened as that the drift, debris, refuse logs and other materials of which it was composed floated lower down the creek and formed other jams at different points, one of which being opposite the dike erected on plaintiff's land for its protection against overflow from said creek. It is declared that these latter jams became compact in form, and in that condition would not have interfered with the natural capacity of the creek to carry to the Humboldt bay all the waters, debris, etc., naturally flowing therein, but that defendant carelessly and negligently caused said jams to be loosened, with the result that said debris and refuse logs, timber and material and drift were forced farther down the stream, form-

ing, at a point where said creek passes through the southwesterly portion of plaintiff's land, an immense jam and an obstruction to the free and natural passage of the waters of said creek. This last-mentioned jam, it is averred, caused the waters of said creek to be restrained from their natural flow and impounded, so that when the winter rains of 1906-7 came, said obstruction or jam caused the waters of said creek to "back up in great and unnatural volume, and rise to a great and unnatural height and break through and destroy said dike and embankment and overflow the banks of said Jacoby creek," and overflow and submerge a large portion of plaintiff's land, thereby destroying said land for pasturage and dairy business purposes, for which plaintiff had leased and to which he had put the use of said land.

The complaint further charges that the defendant had maintained railroad trestles at several different points across Jacoby creek, and that "said trestles obstructed the otherwise free passage of all kinds of drift while being carried down stream in said Jacoby creek by the current thereof."

The answer specifically denies all the important and essential averments of the complaint.

The appellant contends that the evidence is insufficient to justify the verdict, and that the court erred in its rulings receiving and excluding certain evidence and in giving, refusing and modifying certain instructions.

1. That the evidence conclusively shows that in the month of January, 1907, the high waters of Jacoby creek "backed up" and broke through the embankment or dike which had been constructed and maintained on plaintiff's leasehold, and that by reason thereof a large portion of plaintiff's land was inundated and seriously damaged, is not, and, manifestly, could not, be confuted by the defendant.

It is the contention of the appellant, however, that the defendant was in no manner or degree responsible for the breaking of the plaintiff's dike by the high waters of Jacoby creek and the consequent submerging and damaging of plaintiff's land.

The facts developed by the evidence may be epitomized as follows:

The plaintiff, by an instrument in writing, leased the land involved here for the term of six years, beginning with the

first day of November, 1904. By the terms of said lease, he agreed to pay for the use of said land the sum of \$1,800 per year for the first two years of said term and \$2,000 per year for the remaining four years. It was stipulated that said rent should be paid to the lessors in monthly installments equal to one-twelfth of the annual rent on the first of each and every month during the term. It was further covenanted on the part of the plaintiff that he would "keep all buildings, fences, dikes, flood-gates, etc., in good repair during the continuance of said lease."

The land leased by plaintiff was reclaimed tide and marsh lands, and on it were a number of sloughs across which small bridges had been erected and maintained by plaintiff to enable the dairy stock to pass from one part of the land to another.

The plaintiff conducted a dairy business on said land, having leased it expressly for that purpose. The evidence shows that the land damaged was capable of feeding and accommodating about thirty head of cows. This number of cows, it was shown, was in fact kept on the land up to the time that it was overflowed by the waters from the creek.

The "big jam," to which reference has been made, was the result of the gradual accumulation for many years of logs, timber, debris, drift, etc., and was in existence before and at the time the defendant acquired the property and rights of the Bayside Mill and Lumber Company.

In the years 1895 and 1896, one Monahan caused a boom to be placed across the creek at the point where said "big jam" was located, for the purpose of restraining said jam, or preventing it from becoming loosened and floating down the stream. The boom was fastened by a wire rope. The jam remained in this condition for many years and until after the defendant became the owner of the logging and lumbering business of its predecessor. According to the testimony, had said jam remained in this condition—that is, in compact form and so restrained as to have prevented it from floating down with the current during the high waters of the winter—it could have produced no harm.

In the year 1905 the defendant entered into a contract with one De Lucca, by the terms of which the latter agreed to, and in pursuance of said contract did, cut up and convert into

shingle bolts the timber suitable for that purpose of which said "big jam" was largely constituted. The result of thus handling said timber was to so loosen the jam as to cause the remaining materials of which it was partly formed to float down the stream. The complaint charges and the proof shows that other jams were formed in the creek from the materials which came from the "big jam" and floated down the creek.

In January, 1906, the plaintiff served upon the superintendent of defendant a written notice, calling his attention to the probable damage which would result to plaintiff's land if the defendant did not take proper care of the tree tops and timber refuse from its logging operations and prevent the same from being carried into Jacoby creek.

As alleged in the complaint, the evidence discloses that an immense jam was formed near plaintiff's land from the refuse and other materials of which the "big jam" was originally in part formed, and, additionally, as the result generally of the logging operations of defendant. There was also formed a jam around one of the railroad trestles of defendant. It was these last-mentioned jams which finally, through the rise of the waters of Jacoby creek from the rains of the winter of 1906-7, which were directly responsible for the gathering of the water in said creek opposite plaintiff's dike in such a large and unusual volume as that said creek was incapable of accommodating and carrying off the same in and through its natural channel. The result was, as the complaint alleges, that said water "backed up" and broke through plaintiff's dike, flooding approximately eighty acres of his land, forming a new channel of said creek through a portion of said land, and practically destroying for the purposes for which plaintiff had leased it that portion so flooded and inundated.

The immediate effect of the submergence of plaintiff's land in the manner described was, according to the testimony, to leave a large portion thereof covered with refuse, debris, drift, gravel, sediment and salt tide water. Some of the witnesses testified that about seven acres were covered with gravel, from three inches, in some places, to over two feet deep, in other places; that about sixteen acres were covered with sediment of sufficient depth to kill the vegetation growing

thereon at the time, and that approximately sixty acres were covered with salt tide water, the effect of which was to destroy the grass then growing thereon. It was shown that the land inundated could not be restored to its original condition, or to a condition in which it could be utilized for dairying purposes under two years. There were remaining, at the time of the flood, two years of the term stipulated for in the lease, so that that portion of the leasehold affected by the overflow was completely destroyed, so far as plaintiff's rights under the lease were concerned.

The evidence shows that De Lucca cut the timber of which the "big jam" was largely formed and transformed the same into shingle bolts under a contract with defendant.

On behalf of the defense, one Newell testified that for many years prior to the flooding of plaintiff's land, he was engaged in the logging business on Jacoby creek. It appears that he had a contract with the defendant by which he did all the logging for that corporation. He testified that the bank of said creek was very steep at the points where he carried on the logging, and that refuse from the logging operations was naturally carried and precipitated into the bed of the creek by the winter rains and high water. The object of this testimony was, undoubtedly, to show that the overflow of plaintiff's land was caused primarily by the refuse from the logging operations prosecuted by Newell under his contract with defendant as an independent contractor, and not, as alleged and contended by plaintiff, by the formation and disturbance of the jams in the manner described in the complaint.

It further appears, from evidence produced by the defendant, that, for many years, a large rock quarry was operated by certain parties on land bordering upon Jacoby creek. The obvious purpose of this testimony was to show, if it could be done to the satisfaction of the jury, that the bed of the creek was filled with debris or rocks and other refuse as the result of the operation of said quarry, and that thus the channel of the creek was so filled up as to interrupt and greatly interfere with the natural flow or passage of the waters of said creek; that the "backing up" of the water and the consequent flooding of plaintiff's land was primarily and proxi-

mately occasioned by the operations of said rock quarry, and not due to any act or acts of the defendant.

We have thus briefly stated the facts brought out by the evidence introduced by the plaintiff, and have referred to some of the evidence presented by the defendant involving the defenses upon which it appeared to have relied against the claims of the complaint.

Appellant points out a large number of particulars in which it insists that the verdict is not justified by the evidence. These we shall not give specific examination. We have satisfied ourselves, from a painstaking examination of the whole record, that the jury were fully warranted in returning the verdict upon which the judgment is founded.

The questions whether the damage was caused by the operations of the rock quarry or by the logging operations conducted by Newell were for the jury to determine. The verdict is, of course, indubitable evidence that the jury were satisfied from the proofs that the damage was the direct result of the negligence of the defendant.

So it is true as to the question whether De Lucca and Newell were independent contractors. While it is true that both De Lucca and Newell performed the work assigned to them under contracts by which they were to receive a certain specific compensation for such services, not in the nature of wages, each, nevertheless, prosecuted his work in conformity with the general directions of the defendant. The work in which De Lucca engaged was, in fact, done under the direct superintendence of one Monahan, an employee of defendant. Moreover, the court submitted for the jury's decision the questions whether Newell and De Lucca were independent contractors and, if so, whether the performance of the work done by them for defendant in the ordinary mode of doing such work would and did necessarily and naturally result in producing the defect or condition which caused the injury. The jury, therefore, passed upon these questions, and, as the verdict shows, against the theory advanced and contended for by the defendant.

It is scarcely necessary to remark that it is plainly manifest that the necessary and natural result of the removal from the "big jam" of the large quantity of timber out of which from one hundred and forty to one hundred and fifty cords

of shingle bolts were manufactured by De Lucca would be the disturbance of said jam, so that the remainder of the materials of which it consisted would not remain in their original position, but would, upon the first heavy rains and consequent rising of the waters of the creek, naturally flow down the stream with the current. And, in this connection, it may well be observed that such result must necessarily have been known to and anticipated by defendant or its officers.

Appellant advances the further proposition that, in removing the jam which had formed about one of its railroad trestles, it only did what was absolutely necessary to be done in order to protect its property from destruction. This question, too, was submitted to the jury by the court, and upon that as well as upon all the questions of fact submitted for determination the jury's verdict is conclusive.

2. Many errors are imputed to the rulings of the court in admitting and rejecting certain evidence. Most of these involve questions bearing upon the elements which the court permitted to be shown as forming the basis upon which the amount of damages should be determined. The following may be given as examples of the rulings to which we refer: Permitting proof of the kind and character of the crop grown on the damaged land in the year immediately preceding that in which the damage was sustained; proof of the number of cows plaintiff had and which grazed on said land the previous year; proof of what plaintiff did with his cows after the flood—that is, that he was compelled by reason of the flood to rent other land on which to keep and feed said cows; proof of the cost of floodgates destroyed; proof of steps taken and work necessary to divert the waters of the creek to its old or original channel; that plaintiff had to buy feed for his cows subsequently to the flood; the number of pounds of butter fat obtained from said cows in the years 1906 and 1907; the number of cows he had on the land in 1907; the amount of rent he was required to pay for the use of other lands after the flood; the effect of the gravel left on the ground by the flood; the rental value of the flooded land; the cost per acre “to place the land back into the same condition it was before the sediment was on, and to seed it to clover or rye grass”; the value of the crop raised on the land in 1906, the year immediately preceding that of the flood, etc.

The testimony shows, as the complaint alleges, that the flooded and damaged land was under a state of cultivation at the time of the overflow, and that it had formerly produced a sufficient quantity of grasses for the proper sustenance of the dairy cattle kept by plaintiff on said land.

We perceive nothing in the testimony upon the question of damages allowed by the court over the objections of the defendant which was not competent and relevant.

Evidence of what the land produced the year previous to the year in which the damage was sustained was proper as tending to show the adaptability of the land to the cultivation of the crops customarily grown thereon, and its capacity for producing such crops in such quantity as was essential to the dairy business. It will not be denied, we suppose, that it was proper to show the diminished value of the leasehold during the remainder of the term by reason of the damage to the land, and to that end prove the rental value of the damaged land per acre and likewise the cost of restoring the land to the condition in which it was at the time it was submerged. In short, all this testimony, as well as that relating to the number of dairy cows kept by plaintiff and the quantity of butter fat produced the previous year and the cost of maintaining his cows on other land which he was compelled to rent for that purpose after the flood, competently furnished as fair a foundation as can be shown or approximately laid in such cases upon which the jury might be enabled to reach an intelligent, just and satisfactory conclusion as to the probable extent of the actual damage suffered by the plaintiff and thus to arrive at a just and reasonable assessment of damages.

Appellant declares that much of this testimony is too remote and speculative; but it is always permissible, in cases of alleged tortious injury to land, in order to reach a reasonably fair and equitable estimation of damages, to prove that it is peculiarly adapted to the production of a particular kind of crop and what it is capable, under ordinary circumstances, of growing, both as to quality and quantity. Therefore, it is proper to show what the land has ordinarily produced within a reasonable time in the past as bearing upon what it might reasonably be expected to have produced when destroyed, when, as here such destruction has taken place before the

maturity of the crop and what it is probable that it might yield (in this case) during the remainder of the unexpired term of the lease. This, too, together with evidence of what has been the ordinary yield of butter and other products from the dairy, would serve as a reasonable criterion by which the future profits might reasonably be expected to be. And it is always permissible to prove and recover "prospective profits," where it is shown that such profits would naturally and directly flow from a business which had been damaged had such business not been destroyed or impaired by the damage so as to obstruct its prosecution in the usual and ordinary way in which it had always been conducted. (*Hawthorne v. Siegel*, 88 Cal. 159, [22 Am. St. Rep. 291, 25 Pac. 1114]; *Giaccomini v. Bulkeley*, 51 Cal. 260; *Shoemaker v. Aker*, 116 Cal. 240, [48 Pac. 62]; *Barnes v. Berendes*, 139 Cal. 32, [69 Pac. 491, 72 Pac. 406].)

In other words, the damages which, in the ordinary course of things, would be likely to result from a wrongful or tortious injury to property, must be taken as the basis or measure of the compensation to which the complaining party would be entitled for the injury so inflicted. (Civ. Code, sec. 3300.)

That evidence of the diminished value of the leasehold by reason of the injury thereto was competent, is a proposition so obvious that authorities need not be cited in its support, although many may be found in which the doctrine is asserted and applied. (*Ellis v. Tone*, 58 Cal. 289; *Ft. Worth & N. O. R. Co. v. Wallace*, 74 Tex. 581, [12 S. W. 227]; *Ridley v. Seaboard & R. R. Co.*, 118 N. C. 996, [24 S. E. 730]; *Ft. Worth & D. C. Ry. Co. v. Hogsett*, 67 Tex. 685, [4 S. W. 365]; *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37, [54 N. E. 1071]; *Fremont Ry. Co. v. Harlin*, 50 Neb. 698, [61 Am. St. Rep. 598, 70 N. W. 263]; *Baltimore & O. S. W. R. Co. et al. v. Quillen*, 34 Ind. App. 330, [107 Am. St. Rep. 183, 72 N. E. 661]; *Wichita Gas & Elec. Light & Power Co. v. Wright*, 9 Kan. App. 730. [59 Pac. 1085].)

Some other rulings than those to which we have devoted some special attention are complained of, but they were, in our opinion, without prejudice, assuming that they were erroneous.

3. Appellant challenges the correctness of the action of the court in refusing to give certain instructions requested by it and in modifying certain other instructions proposed by it,

and as so modified submitting the same to the jury. We shall notice only a few of these assignments in detail. But we may here say that we have given the entire charge of the court careful consideration, and that therein, in our judgment, every principle applicable to the issues raised by the pleadings and developed by the proofs was correctly declared and explained to the jury by the court in singularly clear language. It may be added that in all instances where instructions, containing correct and pertinent declarations of principles of law, were proposed by defendant and disallowed, the court in other instructions submitted to the jury such principles; and where instructions proposed by defendant were modified, it was either because the principle involved in the part modified was not applicable or not correctly stated or was announced in some other of the given instructions.

There was no evidence justifying the giving of instruction No. 6, requested by defendant, wherein it was proposed to tell the jury that if they found that the injuries to plaintiff's property were caused by the "act of God" the defendant would not be liable.

Instruction 15, requested by defendant and disallowed by the court, was properly refused. It would have declared to the jury that, if the bridges referred to in the complaint as spanning some small sloughs on plaintiff's leasehold were "embedded in the real estate and was considered by plaintiff as a part thereof not to be removed," then such bridges must be considered by them as part of the realty, and that plaintiff could not recover for their destruction. As we have seen, the plaintiff built these bridges for the purpose of permitting his cattle to pass from one field to another, and, while he testified that they were built with the intention that they should remain permanently on the land, it is no defense to a recovery for their loss or destruction to say that they became and were a permanent part of the realty. By the terms of his lease it was his duty to keep the bridges and other fixtures on the premises in repair. But the bridges were an essential and necessary part of plaintiff's leasehold, and as well could it be maintained that he could not recover for the crops growing on the land and destroyed by the water.

The several instructions expounding the principle that a person may take such steps as may be reasonably necessary to protect his own property from injury or destruction, where

he exercised ordinary care in so doing, were properly refused. There was, as seen, some evidence that the defendant had removed a jam which had formed around one of its railroad trestles, and as to this jam and the act of the defendant in removing it, the court instructed the jury that, in order to protect said trestle or any other of its property from destruction or injury, the defendant had the right to remove said jam, if it did so in view of "the rights of others below" and by the exercise of ordinary care. The rejected instructions were entirely too general and indefinite, and would perhaps have tended to mislead the jury into the belief that the defendant caused the "big jam" to be disturbed in order to protect its property, when the truth is, the disturbance of the "big jam" was for the sole purpose, as seen, of enabling the defendant to profitably utilize a quantity of the timber of which said jam was composed. Had said jam been allowed to remain intact, it is probable that the high waters of Jacoby creek brought about by the rains of the winter of 1906-7 could have been easily carried through its natural channel to Humboldt bay and thus the injury to plaintiff's leasehold avoided.

Some complaint is made of the verdict, the claim being that it is so excessive or far beyond a reasonable admeasurement of damages, under the circumstances as revealed by the evidence, that the same must have been given under the influence of passion or prejudice. (Code Civ. Proc., sec. 657, subd. 5.) We cannot say, from the face of the record, that this contention has any merit. It appears to us that the evidence amply justifies the amount of damages awarded. In any event, there is nothing in the record which would warrant this court in substituting its judgment upon that proposition for that of the jury and of the trial judge, to whom the question was no doubt fully presented on the motion for a new trial.

The judgment and order appealed from are, for the reasons herein expressed, affirmed.

Burnett, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 19, 1910.

[Civ. No. 649. First Appellate District.—March 24, 1910.]

J. G. ROSS, Appellant, v. GEORGE FRANK, Respondent.

SALE OF PRUNE ORCHARD — CONSTRUCTION OF CONTRACT — PRICE PER TON, "ORCHARD RUN" — WARRANTY — "TEST ACCEPTED AT 53." —

A contract by plaintiff to sell to the defendant all of the prunes in plaintiff's orchard at \$95 per ton, "Orchard Run," imports that all the prunes in the orchard were sold at that price, without any reference to size or grading. Where the only warranty in the contract is that the prunes shall be of "good, merchantable quality, well dried," the words written at the foot of the contract, "Test accepted at 53," merely mean that the prunes have been tested, and that the result of the test was fifty-three prunes to the pound, and do not import any warranty that they shall be of that number to the pound.

ID.—EVIDENCE ADMITTED TO EXPLAIN CONTRACT—CONSTRUCTION CONFIRMED.—It is held that evidence admitted by the trial court to show the circumstances under which the contract was made, and the oral conversations leading up to it, serves to confirm the construction given by this court to the terms of the contract.

APPEAL from an order of the Superior Court of Santa Clara County denying a new trial. M. H. Hyland, Judge.

The facts are stated in the opinion of the court.

Walter G. Fitzgerald, and John P. Fitzgerald, for Appellant.

Will M. Beggs, for Respondent.

COOPER, P. J.—This action was brought by plaintiff to recover a balance claimed to be due to his crop of prunes for the year 1905 sold and delivered to defendant. The defendant recovered judgment, and this appeal is by plaintiff from the order denying his motion for a new trial.

It is conceded that the findings of the court and the judgment are the result of the construction given by the trial court to the written contract for the sale of the prunes which, with the erasures and interlineations, is as follows:

"H. C. Newby,

Made in Duplicate.

"Purchasing Agent.

No. 70.

"Gilroy, R. D. 26, and Coyote, Cal.

"Prune Purchasing Contract.

"Gilroy, Rural 25 Cal., Sept. 7, 19

"This contract made and entered into the above date by and between J. G. Ross and H. C. Newby of Santa Clara County, Cal. Witnesseth: That for and in consideration of the sum of One (1.00) dollars in hand paid, the receipt whereof is hereby acknowledged, the said Ross has sold to the said H. C. Newby, and said H. C. Newby has bought of the said Ross all of the French prunes now on the trees or being picked and dried from the Ross Orchard on the Soap Lake Road at Prunedale, estimated at about 35 tons more or less when dried, on the following terms and conditions: Terms, cash on delivery at the Geo. Frank & Co. Packing House at San Jose, Cal. For prunes running *Orchard Run* (60 to the pound) when dried, ninety-five \$95 dollars per ton (with variations of one \$1.00 dollar per point up or down), sacks to be furnished by the purchaser. All prunes to be of good merchantable quality, well dried, and delivered on or before Nov. 1st, 1905, and jointly scaled, according to the above terms, when ready to ship. *Test Accepted at 53.*

"J. GEORGE ROSS, Seller.

"H. C. NEWBY, Purchaser.

"Remarks: Purchaser to pay freight charges."

"San Jose, Cal., Sept. 9, 1905.

"We hereby agree and contract to receive and pay for all the prunes mentioned and named in the purchaser's contract on receipt of the same at our packing house at San Jose, Cal., according to the terms, prices and conditions herein set forth, and to furnish the sack for shipping the prunes to our packing house.

"GEO. FRANK & CO.

"By GEO. FRANK."

The contract was prepared upon a printed form used by defendant in making contracts for the purchase of prunes, and the words in italics were written in the contract at the time it was executed, and at the same time the words in parentheses were erased by running a pen through them, so

that they were intentionally taken from the printed contract. It is said that sixty to the pound, or a test of sixty, means sixty dried prunes to the pound as a basis; that "with variations of one dollar per point up or down" means one dollar per ton more when the prunes run less than the basis of sixty to the pound, and one dollar per ton less when they run more than sixty to the pound; so that prunes that would run sixty-five to the pound would be worth five dollars less per ton, and if they ran fifty-five to the pound they would be worth five dollars more per ton, with sixty as a basis. This, however, is not material except in aiding us to arrive at the meaning of the contract.

The trial court held that the phrase "Test accepted at 53" was, as matter of law, a warranty that the defendant was not liable at the rate of \$95 per ton except for such portion of the plaintiff's crop as would test fifty-three according to the tests as herein stated. We do not so construe the contract. The contract was a sale of all plaintiff's French prunes on the trees or being picked and dried from the Ross orchard. The words "Orchard run" were *ex industria* written in the contract. The provisions as to the basis of sixty to the pound and as to variations of one dollar per point up and down, were intentionally erased from the contract. By the words "Orchard run" was meant all the French prunes in the orchard without any reference to size in grading. It was intended that the entire crop of prunes, whether above or below the test of fifty-three, was to be paid for at the rate of \$95 per ton. The only warranty in the contract was that the prunes were to "be of good, merchantable quality, well dried." It is not claimed that they did not comply with the contract in this regard. The phrase "Test accepted at 53" meant that the prunes had been tested and accepted, and that the result of the test was fifty-three to the pound. The agent of defendant examined the prunes, tested them, and stated the result of his test, but he purchased for defendant all the prunes of good merchantable quality, well dried. The whole crop, whether thirty-five tons more or less, was purchased by the ton. The whole crop, whether fifty-three to the pound more or less, was purchased, and it was so intended. No provision was made as to a greater price for superior prunes, or prunes that would run less than fifty-three, nor for a less

price for prunes that should run more. One price for all sizes is the express provision of the contract. The words in the contract, "and jointly scaled, according to the above terms, when ready to ship," were in the printed contract, and would apply provided the prunes had been sold on the basis of sixty, "variation of one dollar per point up and down"; but as the provision to which the words would apply was erased the provision is without meaning as to the contract which the parties really made.

Respondent's counsel says in his brief that about the only question in the case is as to whether or not the trial court properly construed the contract, and it was proper for the court to, and the court did, admit evidence of the circumstances under which the contract was made, and the preliminary oral conversation leading up to it. We have examined the evidence so admitted, and it confirms the views so expressed as to the intentions of the parties set forth in the contract. The plaintiff testified that he went with Newby, the defendant's purchasing agent, who came to his ranch a number of times, and that he assisted Newby in making tests of the prunes; that they examined the prunes thoroughly, and after such examination he sold the entire crop at \$95 per ton; that the part of the contract as to a basis and as to a variation from the basis was by agreement stricken out, and that the prunes were sold for "\$95 per ton orchard run, that is, just as they came from the orchard without any grading." Newby, the agent, who was defendant's own witness, testified that when he went to see plaintiff he told plaintiff that he "would pay 3½ base, that is \$95 a ton for 55"; that plaintiff replied that "he would like to sell the fruit but wanted \$95 a ton straight for it"; that he told plaintiff that if the prunes would test fifty-five he would give him \$95 per ton for it; that he had his scales with him and went over the lot, digging down in the bins, taking about thirty-five tests; that the plaintiff had also taken about a similar number of tests which he had written down in a book; that he took all the tests so made by himself and all the tests made by plaintiff and averaged them; that they averaged fifty-three; that plaintiff said he thought the prunes would hold up to the test, and that he (witness) thought so, too. The witness further said, "Test accepted means that you had already tested the fruit,

and this fruit we did test, as it did run fifty-three. I scratched out the part 'variation' as we had made the test because the part I did test ran fifty-three, and I am a good tester. . . . 'Orchard run' means all the fruit in the orchard and that it is an ungraded lot of fruit. Sometimes in buying we don't take tests. I was to take the entire crop of merchantable fruit."

The defendant testified that the reason he did not receive the prunes was because they did not run fifty-three, but ran about sixty-three; and that when plaintiff came to the packing-house he told plaintiff that the prunes were not running fifty-three, and plaintiff replied, "It did not make any difference as they were all bought at the flat rate of \$95 per ton."

It may be further remarked that some allowance was evidently made in making the test, because Newby testified that he was willing to pay \$95 per ton for prunes that would test fifty-five, and as he only agreed to pay \$95, according to his own testimony they would have been worth \$97 per ton if they had held up to the test of fifty-three, being two points up.

The order is reversed.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 768. First Appellate District.—March 28, 1910.]

In the Matter of the Estate of M. THEODORE KEARNEY, Deceased. MARGARET ZEEDER, Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a Corporation, and MERCANTILE TRUST COMPANY OF SAN FRANCISCO, a Corporation, Executor, etc., Respondents.

ESTATES OF DECEASED PERSONS—PARTIAL DISTRIBUTION UNDER WILL—APPEAL—PRESUMPTIONS—RECITAL—AFFIRMANCE.—Where an appeal is taken from a decree of partial distribution under the will of a deceased person on the judgment-roll, without a bill of exceptions, all presumptions upon appeal are in favor of the regularity of the judgment and decree of the trial court; and where the decree recites that no one appeared or opposed the application, and

that the petitioner is the sole devisee under the will of the deceased, and that deceased left no legal heirs, the judgment must be affirmed.

ID.—SERVICE OF PETITION ON EXECUTOR—RECITAL OF APPEARANCE—PRESUMPTION.—Though the record does not show formal service of the petition of partial distribution under the will on the executor, yet the recital in the decree appealed from that the executor appeared by attorney at the hearing is sufficient proof of the notice of the application to the executor. It must be presumed that it was personally served; but whether it was or not, the appearance by attorney is conclusive that the executor received notice.

ID.—COUNTER-PETITION ON FILE AT TIME OF HEARING—CLAIM BY APPELLANT AS ASSIGNEE OF ALLEGED HEIR—NOTICE NOT SHOWN.—The mere fact that at the time of the hearing of the petition for partial distribution under the will, there was on file a counter-petition of appellant claiming as assignee of an alleged sole heir for partial distribution cannot preclude the affirmance of the decree of partial distribution to the devisee, where there is nothing in the record to show that any notice thereof was served upon the executor or devisee prior to the hearing and decree appealed from, or that they had any knowledge thereof.

ID.—COUNTER-PETITION NOT JUDICIALLY NOTICED—ABSENCE OF DUTY OF COURT.—It was not the duty of the court either to take judicial notice of the fact that the counter-petition of appellant was on file at the time of the hearing of the petition for partial distribution under the will, or to continue the hearing of such petition, so that both petitions could be heard at the same time; nor was it the duty of the court to act as attorney for either party.

ID.—NOTICE TO APPELLANT OF PETITION OF DEVISEE—FAILURE TO APPEAR OR TO OPPOSE.—The appellant having had legal notice of the hearing of the former petition of the devisee for partial distribution, and having failed to appear or oppose the same, his appeal from the decree in favor of the devisee, to which he was no party, is fruitless, and the decree must be affirmed.

APPEAL from a decree of the Superior Court of Fresno County, making partial distribution under the will of a deceased person. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

W. M. Cannon, for Appellant.

F. A. Cutler, for Regents of the University of California, Respondent.

Morrison, Cope & Brobeck, for Mercantile Trust Company, Executor, etc., Respondent.

COOPER, P. J.—This appeal is from a decree of partial distribution, and is brought here on what is termed the judgment-roll without a bill of exceptions. In such case all presumptions are in favor of the regularity of the judgment and decree of the trial court.

The record contains the will of deceased filed in the clerk's office in May, 1906. By its provisions the entire estate is left to the Regents of the University of California, a corporation. It is further provided therein that the deceased did not desire that any portion of his estate should go to his heirs, if any heirs should survive him; and that in case, by reason of the provisions of section 1313 of the Civil Code or otherwise, all of his property could not be distributed to the Regents of the University, then all such residue to be given to W. H. Crocker and other parties named in the will, and appellant was not one of such parties.

In November, 1906, the petition for partial distribution to the said Regents of the University was filed. An order was duly made, designating a time and place for hearing said petition, and the clerk of the court gave notice to all persons interested to appear at said time and place so designated and show cause, if any they had, why such decree should not be made. The time designated in the notice was December 10, 1906, and the notice was posted in three of the most public places in the county at least ten days before the time so set for hearing.

The next information given by the record is as to the filing of a petition for partial distribution to herself by the appellant on the eighteenth day of March, 1909, in which it is alleged that she is the assignee of one Dennis Kearney, and that said Dennis Kearney was the sole surviving heir at law of said M. Theodore Kearney, deceased. The court thereupon, on the filing of such petition by appellant, made an order, fixing the twenty-sixth day of March, 1909, as the time for hearing appellant's petition for partial distribution, which order directed notice of the time and place to be personally served upon the Mercantile Trust Company, the executor of the will of deceased. On the nineteenth day of March, 1909, the court

made the decree of partial distribution herein appealed from, by which it distributed the greater portion of the said estate to the Regents of the University of California in accordance with the will. This decree recites and finds that no one appeared or opposed the petition for such distribution; that the deceased left no legal heirs surviving him; that the Regents of the University of California, a corporation, is the sole devisee. The record not only fails to show that any objection of any kind was made by the appellant to the petition of the Regents of the University, but it does not show that notice of the petition filed by appellant was personally served upon the executor of the will of deceased or upon the Regents of the University, or that they or either of them had any notice of it at the time the petition of the Regents of the University came on for hearing. It is shown that the notice of appellant's petition for partial distribution was personally served on the executor on the nineteenth day of March, 1909, but such fact is perfectly consistent with the fact that such service was made after the decree complained of had been made and signed. In fact, it is perfectly consistent with the record here that the petition of appellant had been withdrawn at the time of the decree to the Regents of the University so made. There is nothing to show what the evidence was on the hearing of the petition, or that appellant had any interest in the estate, or that her assignor was an heir at law of the deceased. It is claimed that notice of the application for partial distribution was not given personally to the executor. It is sufficient that the decree recites that the executor appeared at the hearing by its attorney. We must presume that it was personally served, and whether it was or not, the appearance by its attorney is conclusive as to the executor having received notice. (*Estate of Johnson*, 45 Cal. 257; *Ahila v. Padila*, 14 Cal. 103.)

It is next claimed that the petition of appellant being on file at the time the petition of the Regents of the University came on for hearing, it was the duty of the court to take judicial notice of such petition, and to continue the hearing so that both petitions could be heard at the same time. We are cited to no authority supporting such proposition, and we do not know of any, nor in our opinion was it the duty of the trial judge to act as attorney for the appellant or for either

of the parties. The appellant had notice of the application made by the Regents of the University, and had not appeared or filed any answer or objections to such petition. We must therefore affirm the decree, and it is so ordered.

Kerrigan, J., and Hall, J., concurred.

[Crim. No. 188. First Appellate District.—March 30, 1910.]

THE PEOPLE, Respondent, v. ISABELLA MARTIN, Appellant.

CRIMINAL LAW—DYNAMITING DWELLING—ACT OF LAD IN DEFENDANT'S CUSTODY—FEAR OF LIFE—EVIDENCE—OTHER FELONIES—THEORY AGAINST ACCOMPLICE.—Where a woman defendant was charged with dynamiting a dwelling, and it appears that the act was done at her instigation by a lad of sixteen, who was in her custody, and was prosecuting witness against her, and other evidence was admitted, over her objection, that she had treated the lad cruelly, and had required him to commit other felonies named, for her benefit, on the theory that the lad, as a witness, was not an accomplice whose evidence required corroboration, because compelled to do the act charged, by reason of defendant's menace, and threats of taking his life, it is held that such evidence was not admissible on that theory, since the lad's testimony clearly shows that there was no imminent danger of losing his life, but only a threat of a future, remote and conditional danger thereto, which might have been avoided if the act were refused.

ID.—CONSTRUCTION OF PENAL CODE—EXCEPTION TO CAPABILITY TO COMMIT CRIME—THREATS—REASONABLE BELIEF OF IMMINENT DANGER TO LIFE.—Section 26 of the Penal Code, naming as an exception to persons capable of committing crime, "persons (unless the crime be punishable with death) who committed the act or made the omission complained of under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered, if they refused," is to be construed as importing that a reasonable belief must be so caused that there was an imminent or impending danger to life.

ID.—ANOMALOUS CONSTRUCTION—OTHER PROVISIONS—RIGHT OF SELF-DEFENSE—IMMINENT DANGER.—Since it appears from other provisions of the Penal Code, as well as from the common-law rule, that the right of self-defense or forcible resistance to an aggressor exists only in the presence of imminent danger, it would

be an anomalous condition or construction of the law under section 26 of the Penal Code that would justify or excuse the commission of a felony against the person or property of an innocent person, because the person doing the deed had reason to fear, and did fear, not an imminent and immediate danger, but a future and remote danger, which in the very nature of things could be readily averted by innocent methods.

Id.—COMPULSION OF MINOR—CONSTRUCTION OF STATUTE UNAFFECTED.—

The fact that in this case the person committing the deed, and claiming that it was done under such compulsion as excused him from criminality, was a minor of sixteen years of age, cannot affect the construction of the statute which is general in its terms and applicable to persons of any age. It must be given a reasonable meaning to effect the design of the legislature and promote justice. It requires the same reasonable belief of imminent danger, induced in the same manner, in the case of a minor as in the case of any other person to excuse responsibility for crime.

Id.—INADMISSIBLE EVIDENCE OF MINOR AS WITNESS—MOTION TO STRIKE OUT.—

Inasmuch as it is clear that the minor witness had no fear of imminent danger to his life, but only a fear that defendant at some future time and at some remote place would kill him, all of the evidence admitted as tending to show the existence and reasonableness of such fear was improper, and should have been stricken out on motion of the defendant.

Id.—ERRORS NOT CURED—PROOF BY DEFENDANT.—

Such errors were not cured by the testimony of a witness for the defendant that the minor witness had confessed to him the commission of crimes, and implicating defendant therein, where such testimony covers nowhere near all of the matter erroneously admitted, and which should have been stricken out.

Id.—IRRELEVANT EVIDENCE—DEFENDANT'S POSSESSION OF POISONS

WHEN ARRESTED.—It was error to admit irrelevant evidence to show that defendant, when arrested, ten months after the crime charged, had possession of poisons having no relation to that crime.

Id.—OBSCENE LETTERS AND WRITINGS OF DEFENDANT—PREJUDICIAL ERROR.—

It was prejudicial error to admit in evidence obscene letters and writings of the defendant, in no way connected with the crime charged and tending to show her to be a depraved and vicious woman.

Id.—IRRELEVANT EVIDENCE AS TO OTHER OFFENSES.—

All of the evidence tending to show defendant's connection with other acts and offenses having no relation to the offense charged was highly prejudicial.

Id.—PREJUDICIAL ERROR IN EVIDENCE—NEW TRIAL.—When, as in this case, irrelevant testimony has been admitted, and is of such a

character as to be necessarily prejudicial to the defendant appealing, a new trial must be granted.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. Wm. S. Wells, Judge.

The facts are stated in the opinion of the court.

A. L. Frick, and Burton Jackson Wyman, for Appellant.

U. S. Webb, Attorney General, William H. Donahue, District Attorney of Alameda County, and Walter J. Burpee, Deputy District Attorney, for Respondent.

HALL, J.—The defendant was charged, under section 601 of the Penal Code, with having, on the nineteenth day of March, 1907, at the county of Alameda, deposited and exploded dynamite at and near the house of Frank B. Ogden. Upon her trial she was found guilty, as charged, by the verdict of the jury, and before judgment moved for a new trial. Her motion was denied, and judgment pronounced of imprisonment for the term of her natural life. From the judgment and order she in due time appealed to this court. The record upon appeal consists of the judgment-roll and a full transcript of the reporter's notes of all the proceedings before the trial court, and is contained in five volumes consisting of 2,770 pages of printed matter. The labor of this court, however, has been greatly lessened by the very systematic and lawyer-like manner in which counsel upon both sides have briefed the case.

No attack is made by appellant upon the sufficiency of the evidence to support the verdict, nor upon the correctness of the instructions to the jury. Appellant relies for a reversal solely upon the rulings of the court in admitting evidence and in refusing to strike out evidence that had been admitted over defendant's objections.

The crime with which defendant was charged was not committed by her in person, but was in fact committed by John B. Martin at her instigation, and, as it is claimed, by reason of her coercion. John B. Martin was, at the time of the commission of the crime, sixteen years of age, and though he

had been reared by defendant from babyhood, he was not her child. He was the principal witness for the prosecution, and testified in detail to all the circumstances of the commission of the crime, from which it appears that defendant had for a considerable time before the commission of the crime contemplated the deed, and with the aid of the witness had made careful preparation therefor. Her motive grew out of the result of some litigation which she had had in a department of the superior court of Alameda county, presided over by the Hon. Frank B. Ogden, although the action was not finally tried before Judge Ogden. The witness and defendant discussed the contemplated crime, months before its commission, at Weaverville in Trinity county, where defendant had a home and certain mining properties. Early in January, 1907, they came to Oakland, Alameda county, where defendant owned a home and other property. Under the house belonging to defendant, and in which she and the witness took up their residence, was stored a quantity of dynamite. This was by the witness taken from under the house by the direction of defendant, and placed upon a shelf to dry. Subsequently a portion of it, about twelve sticks, was made into a bomb, by the witness and defendant, for the purpose of dynamiting the residence of Judge Ogden. A long fuse was furnished by defendant and carefully prepared for subsequent use. A bicycle was rented by defendant to enable the witness to quickly escape from the scene of the intended crime. Careful preparations were made to enable an *alibi* to be proved for the witness in case they were suspected or charged with the crime, and on the night of the nineteenth day of March, 1907, the witness, at the direction of defendant, took the bomb and fuse to the residence of Judge Ogden, about a mile distant from the residence of defendant, in which she remained, and after observing that the residence of Judge Ogden was then occupied by members of his family (wife, four children and a maid), placed the bomb upon the front porch of the house, carefully adjusted the fuse, lighted the same, mounted his wheel and rode away to his home, where the defendant awaited his coming. The explosion occurred before the witness reached his home; and though badly injuring the dwelling of Judge Ogden, did no harm to the unsuspecting members of the household sheltered

therein, other than such as may have arisen from fright and nervous shock at the dastardly crime attempted against their home and possibly lives.

During the progress of the trial the prosecution was permitted to prove, not only by the witness, John B. Martin, but by other witnesses as well, brutal and cruel treatment of John B. Martin by the defendant. Also the prosecution was allowed to introduce evidence by the witness, John B. Martin, of numerous thefts committed by him at the instigation of and for the benefit of defendant; also that the defendant, prior to the Ogden dynamiting, planned and caused the witness to carry out or attempt six different felonies, to wit, three cases of arson in 1901, and three attempts to dynamite the residence of Wm. J. Dingee in 1904. Also evidence was allowed over the objection of defendant that after the Ogden affair defendant purchased cyanide of potassium (a deadly poison), and planned to have the witness place the same in a reservoir at Weaverville used to supply drinking water; and also in 1908 planned to have the witness dynamite the residence of Judge George Samuels at Oakland. (The point that this occurred subsequent to the Ogden affair was waived.)

All this evidence, and some other of similar import, was admitted over objections of defendant, and retained over her several motions to strike out, upon the theory that it tended to prove that the witness, John B. Martin, was not an accomplice of the defendant in the crime for which she was on trial, and therefore his testimony as a matter of law would support a conviction without corroboration. This theory is in turn predicated upon the theory that, although the witness with his own hands dynamited the Ogden residence when over a mile distant from the person of defendant, he was guilty of no crime in so doing because, as it is claimed by respondent, he committed the act under threats or menaces of defendant, sufficient to show that he had reasonable cause to believe, and did believe, that his life would be endangered unless he committed the deed. It is contended that the evidence objected to was admissible as tending to show the reasonableness of such belief and the existence thereof. The entire superstructure of respondent's contention is based upon the construction placed by respondent upon section 26 of the Penal Code, which, so far as applicable to the matter under dis-

cussion, is as follows: "All persons are capable of committing crimes except those belonging to the following classes: . . . Eighth. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

The vital point of difference between appellant and respondent as to the effect of this section of the code is this, that appellant insists that the danger to the life of the person claiming the protection of the statute must be, or reasonably appear to be, imminent and immediately impending, while respondent claims that such danger is sufficient to excuse from criminal responsibility for any crime, however heinous, not punishable with death, if committed under threats causing a reasonable belief on the part of the person threatened that a refusal would endanger his life either immediately or at some time in the future.

To make this clear, it is now necessary to state the testimony given by the witness, John B. Martin, as to the threats and the fear under which it is claimed he committed the crime for which defendant was convicted. We quote from the transcript:

"Q. Why did you take this bomb prepared by you and Mrs. Martin, and place it on Judge Ogden's premises? A. Because I was forced to.

"Q. How were you forced to? A. By threats Mrs. Martin made.

"Q. What did she say, what threats did she make? A. She said if I didn't place the bomb in Judge Ogden's porch she would have me arrested for burning the house, take me up to Trinity county, hit me over the head with a sledge hammer, put a stick of powder under me and blow me up, and come into town and say it was an accident, and they would believe it.

"Q. I will ask you what was your feeling toward Mrs. Martin on the nineteenth day of March, 1907, Mrs. Martin this defendant? A. I was afraid of her. I was afraid that she would kill me if I didn't carry out such deeds as she told me to."

It further appeared from his testimony that this threat was made several weeks before the crime was committed, and before the bomb was made. On cross-examination the witness, in response to the question, "Then you want to be understood now, do you, that the fear which you had of what she would do if you did not explode the Ogden bomb was, not that she would kill you or attempt to kill you in Oakland, but she would get you up in Weaverville and kill you there. That is correct, is it?" answered, "It is."

In other words, it was made perfectly clear and certain that the witness did not act under any fear of immediate or imminent danger of his life, but only under a fear that at some future time and at a place hundreds of miles away from the scene of the contemplated crime his life would be in danger from the defendant. Unless such a fear—a fear of a future and remote danger to life—will exempt a person from responsibility for any crime (not punishable with death), committed against the person or property of an innocent third person, all this testimony introduced under the theory that it tended to show the existence and reasonableness of the fear under which it is claimed the witness and perpetrator of the crime acted, was inadmissible.

We do not understand respondent to claim that, at the common law, such a fear of future and remote danger to life would excuse the commission of a felony. The contention of respondent is based entirely upon the wording of section 26 of the Penal Code. At common law, the right to self-defense against imminent and immediate danger to life or limb from an aggressor existed. It only existed, however, to prevent death or bodily injury that was imminent, and could only be exercised against the person threatening the injury. It did not extend to the killing of an innocent third person. It has ever been the rule that necessity is no excuse for killing an innocent person. Blackstone says: "And therefore, though a man be violently assaulted and hath no other possible means of escaping death, but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent. But in such a case he is permitted to kill the assailant, for the law of nature and self-defense, its primary canon, have made him his own protector." (4 Blackstone [Cooley], sec. 30.)

In *Arp v. State*, 97 Ala. 5, [38 Am. St. Rep. 137, 12 South. 301], it is said: "The authorities seem to be conclusive that, at common law, no man can excuse himself under the plea of necessity or compulsion for taking the life of an innocent person."

So, too, while the statute of this state recognizes and sanctions the right of self-defense against an aggressor, the right can only be exercised to prevent an imminent danger or an offense about to be committed. Thus homicide is justifiable "when committed in the lawful defense of such person, or of a wife or husband, parent, child, master, mistress or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished." (Pen. Code, 197.)

"Lawful resistance to the commission of a public offense may be made: 1. By the party about to be injured." (Pen. Code, 692.)

"Resistance sufficient to prevent the offense may be made by the party about to be injured:

"1. To prevent an offense against his person, or his family or some member thereof;

"2. To prevent an illegal attempt by force to take or injure property in his lawful possession." (Pen. Code, 693.)

If the right of self-defense and forcible resistance against an aggressor exists only in the presence of imminent danger, or when an offense is about to be committed, it would be an anomalous condition of the law that would justify or excuse the commission of a felony against the person or property of an entirely innocent person because the person doing the deed had reason to fear, and did fear, not an imminent and immediate danger to his life, but a future and remote danger, and one that in the very nature of things could be readily averted by innocent methods.

The fact that in this case the person committing the deed, and claiming that it was done under a compulsion that excuses him from the criminality of the act, is a minor cuts no figure in the proper construction of the statute. It is general and applicable to persons of any age. While the language is not as exact as it might be, it must be given a reasonable meaning so as to effectuate the design of the legislature

and to promote justice. We would be loath to believe that the legislature intended to excuse one from responsibility for atrocious felonies, committed against the property or person of an innocent person, under a fear, by whatever threats induced, that a refusal would in the future and at some remote place endanger his life. Such a danger in the very nature of things could be easily avoided by innocent methods. It would require very explicit language to induce us to believe that the legislature intended to lay down any such monstrous and unjust rule as that any person should be excused from responsibility for an infamous crime when committed under the fear of future and remote danger to life which in the nature of things could be easily avoided.

We agree with the views expressed by the court in *Bain v. State*, 67 Miss. 557, [7 South. 408], when it said: "We can conceive of cases in which an act, criminal in its nature, may be committed by one under such circumstances of coercion as to free him from criminality. The impending danger, however, should be present, imminent and not to be avoided. . . . The social system would be subverted, and there would be no protection for persons or property, if the fear of man, needlessly and cravenly entertained, should be held to justify or excuse breaches of the law."

So, too, in *People v. Repke*, 103 Mich. 459, [61 N. W. 861], it was said: "Threats of future injury do not excuse any offense. The necessity which will excuse a man for breach of law must be instant and imminent."

Respondent has cited no case that supports its contention. There are none. *Burns v. State*, 89 Ga. 527, [15 S. E. 748], a case arising under a statute similar to ours, lays down the rule directly contrary to the contention of respondent in the case at bar. The report of the Georgia case is somewhat meager, and can only be fully understood by a somewhat careful study of the case. The decision of the court is in the form of a syllabus, preceding the statement of the case. Under the code of that state (section 4303), it is provided that "A person committing a crime or misdemeanor under threats or menaces, which sufficiently show that his life or member was in danger, or that he had reasonable cause to believe, and did actually believe, that his life or member was in danger, shall not be found guilty; and such threats and menaces be-

ing proved and established, the person compelling by said threats and menaces the commission of the offense shall be considered a principal, and suffer the same punishment as if he had perpetrated the offense." The first part of this section excusing the person coerced is not materially different from our statute so far as it relates to the imminency of the danger. The defendant Burns was convicted of murder, and the principal witness against him was his stepmother. It is apparent from the statement of the points involved, and the instructions given and refused, that this witness had previously given false testimony at the coroner's inquest, and which she claimed was given under coercion, and also that she had testified to a state of facts upon the final trial which would make her an accomplice unless she acted under coercion and fear. Upon each point the trial court gave an instruction which ignored the necessity of the fear being of a present impending danger. and refused to give a requested one including this element. The court said: "According to section 4303 of the code, in order for duress or fear produced by the threats or menaces to be a valid legal excuse for doing anything which would otherwise be criminal, the act must have been done under such threats or menaces as show that the life or member was in danger, or that there was reasonable cause to believe and actual belief that there was such danger. *The danger must not be one of future violence, but of present and immediate violence at the time of the commission of the forbidden act.* Thus, where the forbidden act is perjury by a witness at a coroner's inquest, the danger of death or dismemberment at some future time, in the absence of all danger at the time of testifying, will not excuse. . . . A person who aids and assists in the commission of a crime, or in measures taken to conceal it and protect the criminal, *is not relieved from criminality as an accomplice* on account of fear excited by threats or menaces, unless the danger be to life or member, *nor unless that danger be present and immediate* as above announced touching fear under the influence of which perjury is committed." (Italics are ours.)

We understand this case as clearly holding that a person is not relieved of the responsibility for a criminal act because he acted through fear produced by threats, unless the fear was of immediate and imminent danger.

The case is cited as authority for this doctrine in the commissioners' note to the Penal Code of Georgia (adopted in 1895), under section 41, which is a re-enactment of section 4303, and also in the notes to *Arp v. State*, in 19 L. R. A. 359.

We think the Georgia case is directly in point, and is grounded in sound reason and enlightened justice.

Inasmuch as it is clear that the witness, John B. Martin, had no fear of immediate and imminent danger to his life, but only a fear that defendant, at some future time and at some remote place, would kill him, all the evidence now under consideration, admitted as tending to show the existence and reasonableness of such fear, was improper. None of it should have been admitted, and all of it should have been stricken out.

Neither were the errors thus committed cured by the subsequent introduction by defendant of the testimony of Johnion to the effect that John B. Martin had confessed to him to committing some of the same crimes and implicating the defendant therein. The circumstances under which this testimony was introduced bear little resemblance to the facts in the case of *People v. Silvers*, 6 Cal. App. 69, [92 Pac. 506], cited by respondent; but aside from this the Johnion testimony did not cover anywhere near all the matter erroneously admitted.

Other evidence equally objectionable, tending to show the possession by defendant at the time of her arrest (which occurred about ten months subsequent to the commission of the crime for which she was being tried), of various poisons, none of which had any connection with the crime committed at the Ogden residence, was admitted over the objection of defendant.

Evidence of obscene letters and writings of defendant in no way relating to the dynamiting of the Ogden house were admitted. This evidence was very prejudicial to defendant, as it tended to show her to be a most depraved and vicious woman.

However depraved or vicious she might be, she was entitled to be tried only for the crime charged against her; and upon the issue presented by her plea of not guilty only such testimony as was relevant to such issue should have been

admitted. The evidence as to her brutal treatment of the witness, John B. Martin, and as to her guilty connection with the numerous felonies and misdemeanors, had no relevancy to the question as to whether or not she was guilty of the crime of dynamiting the house of Judge Ogden. It is not pretended that it tended to prove that she committed the crime for which she was being tried. Its ostensible purpose was to prove that John B. Martin was not criminally responsible for his acts in placing and exploding the bomb at the Ogden home. But as we have shown, it was not admissible for this purpose. Its character was such as to greatly prejudice the defendant with the jury. The defendant had the right to have all such irrelevant matter excluded from the jury. When, as in this case, irrelevant testimony has been admitted, and is of such a character as necessarily to be prejudicial to defendant, a new trial must be granted. (*People v. Carpenter*, 136 Cal. 393, [68 Pac. 1027]; *People v. Williams*, 127 Cal. 216, [59 Pac. 581]; *People v. Arlington*, 123 Cal. 356, [55 Pac. 1003]; *People v. Lynch*, 122 Cal. 503, [55 Pac. 248].)

Complaint is also made that defendant was compelled to answer questions upon cross-examination not relating to matters about which she had testified in chief. In some respects this complaint seems to be well founded, but as to most of the questions the answers were such as to preclude any inference of prejudice thereby. In view of the necessity for a new trial, we only feel it necessary upon this point to call attention to the rule for cross-examination of defendant as laid down in *People v. Gallagher*, 100 Cal. 466, [35 Pac. 80], *People v. Arrighini*, 122 Cal. 121, [54 Pac. 591], and *People v. Schmitz*, 7 Cal. App. 359, [94 Pac. 407, 419].

The judgment and order are reversed and the action remanded for a new trial.

Cooper, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 28, 1910.

[Civ. No. 714. First Appellate District.—March 30, 1910.]

WAYMAN INVESTMENT COMPANY, Respondent, v. PAUL WESSINGER and HENRY WAGNER, Executors, etc., Appellants.

LEASE—BUILDING VIOLATING FIRE ORDINANCE—LEGALITY OF CONTRACT—CONSIDERATION—ACTION FOR RENT.—Although a contract founded upon an illegal consideration, or having for its purpose a violation of law, may not be enforced, yet a lease of a building constructed in violation of a fire ordinance, which does not in terms prohibit the lease, is not founded upon an illegal consideration, and if it is not made for any illegal purpose, an action for rent may be based upon such lease in favor of the owner of the building as lessor.

ID.—EVIL ACCOMPLISHED PRIOR TO LEASE—RIGHTS OF CITY—PROPERTY OF OWNER—ESTOPPEL OF LESSEE.—In such case, the evil in the violation of the fire ordinance had been accomplished prior to the lease; and though perhaps the city might have ordered it removed, yet until this was done, it remained the property of the plaintiff as owner, and defendants could not take and enjoy the possession thereof under a lease, and dispute its validity, and refuse to pay the rent reserved. To allow such refusal would be to encourage a gross breach of fair dealing.

ID.—PROPERTY ACQUIRED IN VIOLATION OF LAW—SUBJECT OF LEGITIMATE CONTRACTS—ENFORCEMENT.—The mere fact that property is acquired in violation of law does not rob it of its character as property, nor prevent it from being the subject of legitimate contracts which may be enforced in courts of law.

ID.—TEST OF ENFORCEMENT.—Although there may be some illegal features connected with a transaction involved in a suit, yet the plaintiff may recover if his cause of action is otherwise legitimate, and he can make out his case without calling to his aid any illegality. The test of whether the demand can be enforced at law is whether the plaintiff requires the aid of an illegal contract to establish his case.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Jas. M. Troutt, Judge.

The facts are stated in the opinion of the court.

Sterling Carr, for Appellants.

J. M. & H. L. Rothchild, for Respondent.

HALL, J.—Appeal from judgment in favor of plaintiff for the sum of \$300, rental for certain premises leased by plaintiff to defendants by a written lease.

The lease was executed in September, 1906, and the defendants entered into possession of the demised premises, and have ever since continued in possession, but refuse to pay the agreed rental falling due March 12, 1908, solely upon the ground that the building which they leased and the possession of which they have enjoyed, and apparently still retain, was erected in violation of the provision of the ordinance establishing fire limits and regulating the construction of buildings.

It is contended by appellant that because the erection of the building was a violation of such ordinance punishable by a fine, the consideration for the contract of lease between plaintiff and defendants was illegal, and the contract in consequence void.

That a contract founded upon an illegal consideration, or having for its purpose a violation of the law, is void, and may not be enforced, cannot be denied. Such are the cases cited by appellant. But to the proposition that the leasing and giving possession of a building, originally illegally constructed, for an agreed rental involves any violation of law, we cannot agree. The ordinance does not in terms prohibit the leasing of such a building, and the lease in this case was for no illegal purpose.

This case is analogous to *Sharp v. Taylor*, 41 Eng. Reprint, 1153, 2 Phil. Ch. 801. The action was of an accounting between joint owners of an American vessel. The owners were British subjects, and, in violation of an act of parliament, had caused the vessel to be registered in the name of an American owner in order that she could be used in commerce between American and British ports. The lord chancellor said: "The next point is that plaintiff's claim is in violation of the English ship registry acts. . . . But the answer to the objection appears to me this—that the plaintiff does not ask to enforce any agreement adverse to the provision of the act of parliament. He is not seeking compensation and payment for any illegal voyage; that matter was disposed of when Taylor received the money; and the plaintiff is now only seeking for payment of his share of

realized profits. The violation of the law suggested was not any fraud upon the revenue, or omission to pay what might be due, but, at most, an evasion of a parliamentary provision supposed to be beneficial to the ship owners of this country, an evil, if any, which must remain the same whether the freight be divided between Sharp and Taylor, according to their shares, or remain altogether in the hands of Taylor.”

So in the case at bar the violation of the ordinance had been accomplished. The evil had been done before the lease was executed. It was perhaps within the power of the municipality to cause the building to be removed. But until this was done it remained the property of plaintiff, and defendants certainly had no right to take and enjoy the possession thereof under a lease and not be bound by the terms thereof. A different question would be presented if the action was by the builder to recover for having constructed the building; but to permit the defendants in this case to take and enjoy the possession of plaintiff's building without paying therefor as they agreed would be to encourage the grossest breach of fair dealing in the business world. (*McDonald v. Lund*, 13 Wash. 412, [43 Pac. 438].) The mere fact that certain property has been acquired in violation of some law does not rob it of its character of property, nor prevent it from being the subject of legitimate contracts which may be enforced in courts of law. (*Roselle v. Beckemeier*, 134 Mo. 380, [35 S. W. 1132]; *Andrews v. New Orleans etc. Assn.*, 74 Miss. 362, [60 Am. St. Rep. 509, 20 South. 837]; *Minnesota etc. Co. v. Whitebreast etc. Co.*, 56 Ill. App. 248; *Brooks v. Martin*, 69 U. S. 70; *Planters' Bank v. Union Bank*, 83 U. S. 483.)

“Although there may be some illegal features indirectly connected with a transaction involved in a suit, yet the plaintiff may recover if his cause of action is otherwise legitimate, and he can make out his case without calling to his aid the illegal agreement. The test of whether the demand can be enforced at law is whether the plaintiff requires the aid of the illegal contract to establish his case.” (*Minnesota Lumber Co. v. Whitebreast Coal Co.*, 56 Ill. App. 248.)

The contract relied upon by the plaintiff in this case was entirely independent of, and had no connection with, the violation of the ordinance involved in the construction of the building. It is a matter of the history of San Francisco that after the great fire of April, 1906, by tacit consent of the public authorities property owners were allowed to construct buildings within the fire limits without regard to the fire ordinance. It was the only practicable method of providing facilities whereby thousands of citizens might resume useful and necessary business and callings. These defendants having availed themselves of one of such buildings to conduct their legitimate business, it would be a perversion of justice for a court of law to sanction their evasion of the payment of the agreed rent. We do not think the law requires it.

The judgment is affirmed.

Cooper, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 28, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 26, 1910.

[Civ. No. 768. Second Appellate District.—March 31, 1910.]

KIEFHABER LUMBER COMPANY, a Corporation, Respondent, v. CONSOLIDATED LUMBER COMPANY, a Corporation, Appellant.

SALES OF LUMBER—COLLECTION AGENT FOR DEFENDANT—DELIVERY OF ORDERS TO CUSTOMERS—CHARGE TO AGENT—PAYMENT OF EXCESS—RECOVERY BY ASSIGNEE.—When a lumber company, assignor of plaintiff, stood in the position of an agent for defendant company in collecting sales of its lumber and making collections, and the lumber sold was directly delivered by defendant to each customer and the price charged to its agent, the agent can only be held chargeable with the actual contract price of the lumber shipped to a customer; and where, by mistake, an overcharge was

made to the agent, and the excess was paid to defendant, in ignorance of the error, the agent company was entitled to reimbursement from defendant of the amount of the error occasioned by defendant's act, and the plaintiff company, as its assignee, may recover judgment for such amount, where no part of it was ever paid.

ID.—SUFFICIENCY OF ASSIGNMENT.—A written bill of sale subsequently made by the agent company transferring all of its assets to the plaintiff company, including its claim against the defendant for reimbursement of the excess paid to defendant, entitles the plaintiff to recover the amount thereof.

ID.—ASSIGNMENTS OF INSUFFICIENCY OF EVIDENCE—SUPPORT OF FINDINGS AND JUDGMENT.—Where the only specifications of error made by the defendant company appealing relate to the insufficiency of the evidence to sustain the findings, and there is evidence sufficient to support every finding made by the court in favor of plaintiff and its assignor, and against the answer of the defendant, and the findings support the judgment for plaintiff, the decision of the trial court must be sustained.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order denying a new trial. Benjamin F. Bledsoe, Judge.

The facts are stated in the opinion of the court.

W. W. Middlecoff, Percy R. Wilson, and H. M. Willis,
for Appellant.

Eugene C. Campbell, for Respondent.

'ALLEN, P. J.—The facts as found by the court are these: Defendant, a corporation, was engaged in the wholesale lumber business at Los Angeles. The Newport Lumber Company, a corporation, was engaged in the retail lumber business at Redlands in San Bernardino county. The principal amount of the capital stock of the latter company was owned by the former. The defendant company sold to the Newport company a bill of lumber which was by the defendant shipped directly to the consumer, but charged, under a business arrangement existing between the two corporations, to the Newport company. In billing the lumber to the Newport company a charge of \$446.29 in excess of the contract price at which the lumber was sold appeared. The New-

port company, without discovering such error, paid to defendant the amount of the bill as rendered to defendant. Thereafter, the Newport company sold and assigned to plaintiff its claim on account of such excess payment so made by mistake, no part of which has ever been repaid. The court rendered judgment in favor of plaintiff, from which judgment and an order denying a new trial defendant appeals.

The issues presented by the pleadings involve not only the fact of sale and delivery of the lumber as found by the court, but the payment of the sum through mistake, as well as the assignment of the claim, if any existed. An affirmative defense was presented by defendant's answer, to the effect that any claim on account of overcharge in the transaction was not included in the sale and assignment of the assets of such company to plaintiff. The court found against defendant as to each and all of the allegations of its answer. The specifications of error all relate to the insufficiency of the evidence to support the various findings.

Considering the findings with reference to the sale and the fact that an error existed in the billing of the lumber, we find evidence in the record tending to show that one Nofziger, the active agent in the contract of sale on behalf of the lumber company, was the president of the Newport company, as well as the sales agent of the defendant, but the retail lumber business in Redlands and vicinity as between the two corporations had been allotted as territory in which the Newport company was to carry on its retail business; that the material connected with the controversy had been contracted by Nofziger at a fixed price less than the listed retail price at which lumber was billed to the Newport company, and, notwithstanding the direct shipment to the consumer, the transaction was treated between the two corporations as a retail sale in the territory of the Newport company, and, in keeping with their business transactions, the charge by defendant was made directly to the Newport company, and the Newport company, in ignorance of the contract made with the consumer, credited the defendant with the list price and charged the consumer therewith. After payment by the Newport company to defendant, the Newport company undertook to collect the amount of the bill, when the error was discovered, and Nofziger,

admitting the mistake, directed the Newport company to credit the consumer with the excess above the contract price and charge back to the Consolidated company the amount of such error, and a settlement was made by the Newport company with the consumer accordingly.

We think, under the circumstances narrated, the Newport company, being in a sense a collection agency for the defendant, could only be held chargeable with the actual contract price of the material shipped to the consumer, and having no knowledge of the error and being restricted in the amount of its collection from the consumer to the actual contract price, was entitled to reimbursement from the defendant of the amount of such error occasioned by defendant's act. The contract, under the circumstances, was correctly interpreted by the trial court as a sale to the Newport company. The written bill of sale subsequently made by the Newport company to the plaintiff comprehended a transfer of all of its assets, including this claim against defendant.

Treating the amendment to defendant's answer, in which is alleged the mistake in the bill of sale, as a pleading sufficient to raise an issue entitling defendant to a correction thereof, the court determined that it was not satisfied that such mistake existed, and found against the defendant in relation thereto, and from the evidence the court was warranted in such finding.

The record presents a case which, in our opinion, demands upon the part of defendant that it reimburse the assignee of the Newport company, plaintiff herein, to the extent of the error so occasioned by the Consolidated company; and we find no error in the record warranting a reversal of the judgment or of the order, and the same are affirmed.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 776. Second Appellate District.—March 31, 1910.]

TROY LAUNDRY MACHINERY COMPANY, LIMITED.
Respondent, v. **DRIVERS' INDEPENDENT LAUN-**
DRY COMPANY, Appellant.

APPEAL—MOTION TO DISMISS—TIME FOR FILING POINTS AND AUTHORITIES—DEATH OF RESPONDENT'S ATTORNEY—PROCEEDINGS SUSPENDED—MOTION DENIED.—Under section 286 of the Code of Civil Procedure, upon the death of the attorney for respondent, all proceedings against respondent on behalf of appellant were suspended until such time as respondent voluntarily, or in response to proceedings instituted by appellant, appointed another attorney, or appeared personally; and where a newly appointed attorney for respondent at once moved to dismiss the appeal for failure of appellant to file its points and authorities in time, and it appeared that at the time of such death appellant had unexpired time therefor, they were properly filed within such time after appointment of the new attorney, and when filed within proper time thereafter, the motion to dismiss the appeal must be denied.

MOTION to dismiss an appeal from a judgment of the Superior Court of Los Angeles County. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

D. Z. Gardiner, and Millsap & Sparks, for Appellant.

Horace S. Wilson, and Constan Jensen, for Respondent.

SHAW, J.—Motion to dismiss appeal from judgment upon the ground that appellant failed to file its points and authorities within the time prescribed by the rules of this court. (Subd. 4, rule II, [78 Pac. vii].)

The transcript was filed December 6, 1909, and the period of thirty days allowed to appellant for filing its points and authorities expired on January 5, 1910. The points and authorities, however, were not filed until February 23, 1910. The reason for the delay, as appears from appellant's affidavit filed in opposition to the motion, was that respondent's attorney died on December 30, 1909, at which time ap-

pellant had six days within which to file its points and authorities. Upon the death of an attorney all further proceedings against the party for whom he was acting as attorney are stayed until such time (unless he of his own motion appoint another attorney) as the adverse party shall by written notice require him to appoint another attorney or appear in person. (Code Civ. Proc., sec. 286.) By virtue of the provisions of this section all proceedings in the prosecution of the appeal were suspended from the date when respondent's attorney died until such time as respondent voluntarily, or in response to proceedings instituted by the adverse party, as provided by said section 286, appointed another attorney or appeared personally. On February 16, 1910, respondent selected another attorney, notice of the appointment of whom was on the same day, together with a motion to dismiss the appeal, served upon appellant. This action on the part of respondent in appointing an attorney rendered it unnecessary for appellant to give the notice prescribed in section 286, *supra*. (*Nicol v. San Francisco*, 130 Cal. 288, [62 Pac. 513].) Appellant, therefore, had six days remaining from and after February 16, 1910, within which to file its points and authorities. This period expired on February 22d, which, being a holiday (Code Civ. Proc., sec. 10), should be excluded in the computation (Code Civ. Proc., sec. 12), thus extending the time to February 23, 1910, on which date the points and authorities were filed. Under the circumstances of this case they were filed in time.

The motion to dismiss is denied.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 609. Third Appellate District.—April 1, 1910.]

In the Matter of the Estate of AGRIPPA L. OVERTON, Deceased. E. C. OVERTON, Widow, Appellant, v. H. L. OVERTON, J. G. OVERTON, and C. H. OVERTON, Heirs and Devisees, Petitioners, and D. A. HANNAH, and E. C. OVERTON, Executors, Respondents.

ESTATES OF DECEASED PERSONS—FAMILY ALLOWANCE—ORDER OF DISCONTINUANCE NOT APPEALABLE—CONSTRUCTION OF CODE.—Under subdivision 3 of section 963 of the Code of Civil Procedure, an appeal is only allowed from an original order granting or refusing to grant a family allowance, and an order discontinuing a family allowance granted “until further order of the court” upon the petition of the heirs and devisees under the will of the deceased is not appealable.

ID.—OBJECTION TO JURISDICTION OF COURT—CERTIORARI—APPEAL.—If the court was without jurisdiction to make the order appealed from, as objected by appellant, its power could only be tested by *certiorari*, and not by appeal.

ID.—MOTION TO DISMISS APPEAL—WANT OF AUTHORITY TO MAKE ORDER IMMATERIAL.—It is not a sufficient answer to a motion to dismiss the appeal from the nonappealable order that the lower court had no authority to make the order appealed from. The right of appeal comes from the statute, and not from any unauthorized action of the court.

ID.—RETENTION OF POWER TO MAKE ORDER—“FURTHER ORDER OF COURT”—DUTY OF COURT.—The court retained its power over the order granting the family allowance, by inserting the provision, “until the further order of the court.” Upon a proper showing, it became its duty, and it was within its power, to reduce or discontinue the allowance.

MOTION to dismiss an appeal from an order of the Superior Court of Butte County, discontinuing a family allowance. John C. Gray, Judge.

The facts are stated in the opinion of the court.

Park Henshaw, for Appellant.

Richard White, and Lon Bond, for Respondents.

CHIPMAN, P. J.—On June 1, 1908, the superior court made an order allowing the surviving widow fifty dollars per month from the date of the death of decedent for her maintenance and support, “and to continue until the further order of this court.” On November 28, 1908, H. L. Overton, on behalf of himself and certain other children and heirs at law of deceased, devisees and legatees of the will of decedent, filed a petition praying for the discontinuance of said allowance. On December 1, 1908, the petition came on to be heard and the court on that day made an order granting the petition “discontinuing any family allowance to the said widow in said estate.” The widow appeals from this order on the ground, as stated in her brief, that under section 1466, Code of Civil Procedure, the court “must make such reasonable allowance out of the estate for the widow,” etc., and that when so made the order “becomes a final judgment in her favor for that amount”; that no appeal having been taken from that order and the time for appeal having passed, the power of the court over its order was at an end and “the superior court was without jurisdiction to review the order.”

Respondent makes the point that the order is not appealable, which we think is well taken. Subdivision 3, section 963, Code of Civil Procedure, gives an appeal from an order “against or in favor of setting apart property, or making an allowance for a widow or child.” No appeal is given from an order discontinuing an allowance. If the court was without jurisdiction to make the order complained of its power could be tested by *certiorari*, but not by appeal. (Code Civ. Proc., sec. 1068.) Appellant attempts to meet the point by the suggestion that as the effect of the order is to deprive her of the allowance, it is equivalent to an order refusing to grant an allowance. We cannot so understand the code section. It refers to the original order granting or refusing the allowance prayed for. In analogous cases the supreme court has denied the appealability of such orders as the one here. In *Estate of Smith*, 51 Cal. 563, an appeal from an order refusing to set aside an order of sale (an appealable order) was dismissed. Like action was taken in *Estate of Dunne*, 53 Cal. 631, where the order appealed from was an order setting aside a former order allowing an ac-

count. So, also, in *Estate of Hickey*, 121 Cal. 378, [53 Pac. 818], where the order appealed from vacated a prior order settling a final account. Likewise, so held in *Estate of Cahill*, 142 Cal. 628, [76 Pac. 383], where the order appealed from was an order refusing to vacate an order setting apart a homestead.

It is not a sufficient answer to the motion to dismiss the appeal, that the lower court had no authority to make the order appealed from. The right to appeal comes from the statute and not from any unauthorized action of the court. (*Harper v. Hildreth*, 99 Cal. 265, [33 Pac. 1103].)

The court retained its power over the order by the provision—"until the further order of this court." Upon proper showing it became its duty and it was within its power to reduce or discontinue the allowance. (*Estate of Montgomery*, 60 Cal. 648; *In re Stevens*, 83 Cal. 322, 326, [17 Am. St. Rep. 252, 23 Pac. 379]; *Estate of Freud*, 131 Cal. 667, 674, [82 Am. St. Rep. 407, 63 Pac. 1080]. See *Cahill v. Superior Court*, 145 Cal. 42, [78 Pac. 467]; *Bell v. Bell*, 2 Cal. App. 338, 341, [83 Pac. 814].)

The appeal is dismissed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 649. Third Appellate District.—April 1, 1910.]

EVANS DITCH COMPANY et al., Respondents, v. LAKESIDE DITCH COMPANY et al., Appellants.

WATER RIGHTS—INTERFERENCE WITH DITCH—MANDATORY INJUNCTION—PRESCRIPTIVE TITLE OF PLAINTIFFS—SUPPORT OF FINDING AND JUDGMENT.—In an action by plaintiffs to obtain a mandatory injunction requiring defendants to remove all obstructions to the flow of sixty cubic inches of water per second of the waters of a stream in controversy into the ditch of the plaintiffs for use on their lands, it is held, upon a review of the evidence, that it supports a finding that plaintiffs and their predecessors had acquired a prescriptive title to that quantity of water as against the defendants, by adverse user for the requisite period, and that such

finding is pivotal to the judgment awarding the relief sought, which cannot be disturbed.

ID.—EFFECT OF STIPULATION AS TO PLAINTIFFS' LONG USER—PROOF OF ADVERSE USER.—A stipulation made for the purpose of trial, the language of which is unmistakable as to the use by plaintiffs and their predecessors of the quantity of water claimed for twenty years, leaves only the proof that such stipulated user was adverse, under a claim of right, and hostile to the interests of the defendants. *Held*, that the evidence warrants the rational inference that such stipulated user was open, notorious, and under a claim of right, and therefore adverse.

ID.—ACQUIESCENCE OF DEFENDANTS.—The court below from this long-continued use might have presumed the knowledge and acquiescence of defendants; but it had also the direct statements of witnesses clearly revealing such knowledge and acquiescence.

ID.—QUESTIONS OF FACT—ADVERSE USER—IMPLIED LICENSE.—The questions whether or not the user was adverse or was with the implied license of the defendants were questions of fact to be determined by the court in the light of the surrounding circumstances.

ID.—MEANS OF DIVERSION IMMATERIAL—ARTIFICIAL AND NATURAL CHANNEL.—The result as to adverse user is not affected by the circumstance that the diversion was by means both of an artificial and a natural channel, such as by a ditch and slough used by plaintiffs in the present case to divert the water to use on their land; and an appropriation so made will be as effectual as if it was carried through a ditch or pipe made for that purpose and no other.

ID.—ABSENCE OF DISTINCTION AS TO PRESCRIPTIVE RIGHT OR APPROPRIATION.—So far as respects the use both of an artificial and natural channel, there is no difference between the appropriation of water under a claim of right and for the requisite time to ripen into a title by prescription, and the case of an appropriation specifically provided for in sections 4115–4122 of the Civil Code.

ID.—USE OF WATER FOR BENEFIT OF PLAINTIFFS—SUFFICIENCY OF EVIDENCE.—*Held*, that the court was entirely justified in concluding from the evidence that the diversion of the water and its use was for the benefit of the plaintiffs; and that they being in possession when the defendants obstructed the flow of the water are presumed to be the owners thereof in the absence of a showing by defendants to the contrary, and that the water right followed the ownership of the ditch in the plaintiffs.

ID.—EVIDENCE OF PRIOR APPROPRIATION—LOW WATER IN STREAM.—Evidence showing that when the water was low in the stream diverted at the point of diversion of plaintiffs, it would not reach the ditch of defendants by seepage or otherwise, and could not be

used by them, would establish that the plaintiffs were prior appropriators, and that the defendants were trespassers in interfering therewith.

ID.—EVIDENCE AS TO AMOUNT OF WATER APPROPRIATED—ADMISSION WITHOUT OBJECTION.—Where evidence as to the amount of water appropriated was admitted without objection, it cannot be said that the trial court was not justified in acting upon it. The estimate of such amount by a hydraulic engineer seems the best available, in the absence of contrary evidence.

ID.—QUALIFICATION OF EXPERT WITNESS AS MEASURER OF WATER—DISCRETION OF COURT.—In determining the qualification of an expert witness as a measurer of water, the trial court has quite a wide discretion, and it cannot be said that it was abused in determining that he was not qualified and in striking out an answer made by such witness, which would not assist the court in determining the quantity of water to which respondents were entitled.

ID.—EVIDENCE OF CLAIM OF RIGHT BY PLAINTIFFS.—Evidence was admissible to show, in aid of plaintiff's prescriptive title, declarations made by them asserting their claim of right to use the water.

ID.—ABSENCE OF PREJUDICIAL RULINGS.—It is held that the court made no prejudicial rulings upon evidence calling for a reversal of the case.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

Lamberson & Lamberson, Frank H. Short, and C. L. Russell, for Appellants.

E. O. Larkins, and Hannah & Miller, for Respondents.

BURNETT, J.—The Kaweah river, as stated by appellants, has its source in the Sierra Nevada mountains, in the eastern portion of Tulare county, and flows in a generally western direction to Tulare lake. At a point known as McKay point, where the stream emerges from the foothills, it divides into two branches, the southern one of which retains the name Kaweah and the northern one taking the name of "St. Johns river." Between these two streams there is also a natural channel called Lane slough emptying into said Kaweah river. About the year 1877 an artificial channel or

ditch was dug connecting St. Johns river with said slough, and by means thereof water was diverted from said St. Johns to the said Kaweah river. The plaintiffs are appropriators from the latter stream below the mouth of said slough and the defendants are appropriators from the St. Johns below the point where it was tapped by said ditch. In February, 1906, the plaintiffs brought this action to secure a mandatory injunction requiring the defendants to remove all obstructions that prevent the flow of water from the said St. Johns into Lane slough, and "to permit the free flow of the waters from said St. Johns river through the same to the said Kaweah river," and for general relief. The defendants admitted that they "dammed up the said canal or ditch where the same was taken out of said St. Johns river and interfered with and prevented the flow of water through the same," but it is claimed that they were entitled to said water and that plaintiffs had no interest whatever in the same, and that it had been wrongfully diverted by parties who were "not in privity or acting for or on behalf of plaintiffs or any of them."

The finding of the court upon which the controversy really hinges is, "That in the year 1877 the predecessors in interest of said plaintiffs entered upon the northeast $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of section 2, T. 18 S., R. 26 E., M. D. M., in said county of Tulare, and excavated and dug and made a canal or ditch leading out of said St. Johns river at said point into the bed or channel of said Lane Slough and by means of said canal or ditch and the said slough diverted from said river ninety-nine and $\frac{60}{100}$ cubic feet per second of the waters thereof, for the irrigation of their lands lying along the line of the respective ditches of plaintiffs; that at the commencement of this action, plaintiffs claimed the right to use and divert sixty cubic feet per second of said waters of said river for said purposes, and plaintiffs or their grantors or predecessors in interest, did each and every year after the year 1877, up to the 23d day of March, 1902 (when defendants filled up said ditch), divert and use for said purposes, under claim of right so to do, openly, notoriously, continuously, peaceably, exclusively, hostile to, and with the knowledge and acquiescence of defendants and each and all of them, and adversely to them, and each of them, sixty cubic

feet per second of said waters of said St. Johns river, through and by means of said ditch or canal, and the channel of said Lane slough, at all times when there was not more than two hundred cubic feet per second of water flowing in the channel of said St. Johns river at the head of said canal or ditch on said section 2."

It is contended by appellants that this finding is utterly unsupported, in that the evidence fails to show (1) that the plaintiffs are the successors in interest of the persons who dug the ditch in question; (2) that the use of said water by plaintiffs or their predecessors was such as the statute requires in order to ripen into a title by prescription; (3) that there was any transfer of the title to the Lane slough, or the ditch or water rights connected therewith, from the original owners to plaintiffs or any of them.

Some of the other findings are assailed also, but it is recognized that said finding 5 is the vital one in controversy, and as to this finding the principal point of attack upon which appellants rely is shown in the following quotation from their brief: "Upon the issues made by these allegations of the complaint and the denial thereof by the defendants the principal portion of the evidence in this case was introduced. The whole subject of the statute of limitations as applied to an adverse diversion of water was gone into, and it seems that the plaintiffs did not make a case which would comply with any of the rules laid down by this and other courts of last resort, under the statute of limitations. The actions of the plaintiffs and defendants resulted in producing nothing more than a scrambling possession which fluctuated from day to day during the irrigation season and was not limited to any particular time, except that some of the witnesses testified that when there was plenty of water for everybody they did not interfere with the running of the water through this ditch, and of course that kind of use by the plaintiffs would not be an invasion of the rights of the defendants."

But in the consideration of this pivotal question and of others less important we are confronted by a stipulation entered into by the parties and filed as a record at the beginning of the trial, as follows: "It is hereby stipulated between the parties to the above-entitled action and for the purposes

of the trial of said action, that the plaintiffs in said action are respectively the owners of the respective ditches mentioned in the complaint herein, and that the said plaintiffs and their predecessors in interest, as alleged in the complaint herein, have each severally diverted, and used, during the times mentioned in said complaint, the respective quantities of water into the said respective ditches, as alleged in said complaint, when there was that much water flowing in the said Kaweah river or Mill creek at the respective heads of the said ditches." It is not disputed that the water diverted from the St. Johns river through the aforesaid ditch dug in 1877 and the said Lane slough flowed into the Kaweah river above the heads of said ditches referred to in said stipulation, and that it continued in said river till it reached said ditches. Attaching, therefore, the ordinary signification to the plain and unambiguous language of the stipulation, it would seem to mean that the plaintiffs and their predecessors have used during the time mentioned in the complaint, to wit, "for more than twenty years last past," the water "turned into said Lane slough at or near its head in the said St. Johns river by means of headgates, dams and other artificial structures," amounting to "as much as sixty cubic feet per second," and this was "diverted and conducted down the channel of said Kaweah river and Mill creek and turned into the heads of their respective ditches," and it "was used by plaintiffs during said time for the irrigation of agricultural lands lying along the line of said respective ditches, and for watering livestock kept thereon and for other useful and beneficial purposes," and its use "has at all said times been made under claim of right so to do with the knowledge and acquiescence of said defendants, and each of them, uninterruptedly, openly, notoriously and hostile to said defendants and each of them, and continuously and adversely to each of them."

Appellants claim, however, that this is extending the scope of said stipulation beyond the intention and construction of the parties. They say that "If the parties had stipulated to that effect, there would have been nothing in the case to try. That was the whole point in the case; whether or not the plaintiffs had acquired the right to divert any water from the St. Johns river into Lane slough by means of this

ditch, and if they had done so for twenty years, there could be no doubt of their having acquired the right, but the stipulation does not purport to deal with that question in any manner whatever. That was the contested point in the case."

While the language of the stipulation is unmistakable as to the use by plaintiffs and their predecessors of the quantity of water alleged in the complaint for twenty years, there is some plausibility in the contention that it was not intended by defendants to admit that this use was under a claim of right and hostile to the interests of appellants. In other words, when the parties stipulated that the plaintiffs and their predecessors "used during the times mentioned in said complaint the respective quantities of water into the said respective ditches, as alleged in said complaint," the expression "as alleged in said complaint" was designed to apply to the quantity of water and not the manner in which it had been used. This harmonizes with the declaration of one of the counsel for appellants made during the trial, that "The stipulation is that the waters claimed to be diverted by the plaintiffs from the Kaweah were diverted by the plaintiffs at the time and in the manner stated when there was that much water in the river. Of course, that don't include anything about authorization or anything of that kind. It includes all that this witness could testify to with reference to the diversion of water from the river because it includes all that there is in the pleadings about the diversion of water from the river." While the foregoing statement is probably not as clear as it would be if made more deliberately, it seems that the point was intended to be emphasized that the authority or right to the use of the water was the question not covered by the stipulation, and therefore a proper subject of inquiry. Respondents must also have so understood the stipulation, as they proceeded to introduce evidence to support their claim of the adverse character of the use. This evidence, it is earnestly insisted by appellants, falls far short of meeting the requirement of the law. We feel assured, however, that, giving it the most favorable consideration, from said evidence a rational inference may be drawn that the use of said water by plaintiffs and their predecessors was open, notorious, exclusive, continuous and under a

claim of right, and therefore "adverse," as that term is generally used.

The testimony showing these elements of title by prescription is given by a number of witnesses. It may be that no single witness has testified to a sufficient number of facts to warrant the conclusion of the court below, as the opportunities for observation on the part of the various witnesses were somewhat circumscribed; but in the aggregate the testimony is a sufficient foundation to support the finding. Alma Hall testified: "I am acquainted with Lane slough. My first acquaintance with it, I couldn't tell you when, but in 1877 was the first time I was there on any particular occasion. In 1877 I went up there and hauled some lumber and put a headgate in about one hundred yards from the St. Johns and stayed there, I guess, about a week, cleaning out the brush and logs and things and grubbing vines. I went up there, I think, on Monday and worked until Saturday afternoon, cleaning and grubbing vines and drift and logs very near down to the Kaweah river. I was back there again in 1879. We went back to turn in some water in Lane slough or to strengthen the wing dam that was turning in the water. . . . When I got up there the wing dam had washed out in spots, so it wasn't turning any water into the slough. There was water running in there without the wing dam. I suppose it was probably a foot deep in the channel of Lane slough, something near that. I think we increased the flow of the water about one-third after we fixed the dam. Frank Duran was there in the interest of the Oakes ditch. John O'Connor was there, I suppose, for the Evans ditch. I was up there again in 1898. I was up and down it different times just passing through that county over Lane slough. I always saw water in Lane slough when there was water in the St. Johns river opposite. Sometimes it would be pretty small; sometimes quite a stream. The water went into the Kaweah river."

Peter L. Fenwick was intimately acquainted with Lane slough in the years 1882 and 1883 and saw the water running through it during those years. "It came from the St. Johns river. There was a time when a large stream was running through there and there were other times when the stream was very small; just owing to the quantity of water

that was in the river how much would come down through the ditch. It emptied into the Kaweah river." He further declared that the headgate was never interfered with. The waste-ways were pulled out sometimes but he did not know who did it. He testified to a conversation he had in 1883 with Mr. Johnson, the president of the Lakeside Ditch Company. He says: "They were there at the head of Lane slough at the same time I was; there was quite a little stream of water in the river and the slough was as full as could be; they didn't do anything. I heard the parties were coming up and I met them by Cutler's bridge. We went up the river together. When we got up to Lane slough one young fellow jumped down and says, 'Here, boys, is where she is goin',' and went out to pull out my waste boards. I just reached down and tapped him on the shoulder and says, 'What are you going to do?' He says, 'I am going to take out these boards.' I says, 'No, don't you do it.' Says he, 'Why?' I says, 'That's my property.' Mr. Johnson came up then and says, 'Mr. Fenwick, ain't you joking?' I says, 'No, I am not. If this is your water you go down to Visalia and make me know that this is your water, then you needn't come up here at all. I will come back and turn it to you.' " He further declared that Mr. Johnson told the young man who attempted to move the boards to let them alone, and that they never molested any of the boards while the witness was there.

James Evans testified that he was at Lane slough in 1878, in the summer time. "I think there was about three feet and a half of water in Lane slough and probably eighteen or twenty or thirty feet wide. There was a good stiff stream. There was a headgate in at that time. The headgate was sixteen feet wide and about eight feet deep. It was about twenty feet long. In 1883 I was there. I went up there to see about ditch matters, for the Burch ditch, the Watson ditch, the Evans ditch and the Oakes ditch. There was a small quantity of water running in Lane slough. That was in October during the dry season. There was very little water in the St. Johns or anywhere in there." He testified to being there also in November, 1883, and January, 1884. On the latter date he went for the purpose of closing the headgate, as there was too much water flowing through. "I

would go there after that maybe twice or three times in a month for about twelve years off and on. There would be sometimes a month or two, or two or three months that I wouldn't go there, but I always went there in the fall of the year when the water was low. I was an owner in the Evans ditch until 1891. I was doing work for the Watson and Burch ditches. I was working for another company, the Kaweah and Mill Creek Company. I went back there usually both in the spring and fall. Between 1884 and 1891, when there was water in the river there was water in Lane slough and if there was any water in the St. Johns river Lane slough after 1886 would draw the low water of the St. Johns and all that water run into Kaweah river at the end of Lane slough. I think I was up there in the year 1885 probably twelve or fifteen times. I did not observe that anyone had interfered with the flow of the water in the Lane slough in any way that season. I never knew of any such thing taking place. I never heard about it. There was a dam put in above the gate in 1885 across the channel that led down to Lane slough. It cut off part of the water. The dam went clear across the stream but the water run over the dam. The dam was put in there by consent. Mr. Dodge and Mr. Watson came and asked if they could put an obstruction in there after the gate wouldn't hold, so as to get more water down the St. Johns. They said they were short of water and there was too much water going down the Kaweah. They said the Kaweah river had a good deal more water in it than the St. Johns and Lane slough was drawing a big stream of water, and they asked if they could put a dam across the head. The headgate wouldn't work, and they said that if they could put a dam in at the head of Lane slough until the run of water was over, then they would take it out. Sam Evans and myself went up there when the water got down pretty low and I took a team and we pulled a portion of the dam out that day and we didn't get through, so I got one of the Dokes to pull the other part of the dam out."

C. P. Majors testified that for three years, from 1894 to 1897, he did work at different times for the Watson ditch and "the other ditches here, the plaintiffs in this action. I was superintendent of the Kaweah and Mill creek at the same time. I was familiar with Lane slough all the time during

those three years. Sometimes Lane slough was pretty full; other times it was not. I kept water in it all the time, turned it all down Lane slough when it was low. I did that by putting in a sand dam. When we put in the sand dam in the St. Johns why of course it all came down Lane slough except seepage. I talked with John Parr (superintendent of St. Johns River Association) at different times. He was taking water down the St. Johns. He told me he wished I would let part of it go down for a few days, then I could shut all out, and I did so, changed it there."

W. G. Pennebaker was familiar with Lane slough from 1892 to 1897, and he testified that "Lane slough always drew water from the St. Johns whenever there was any there. No one came up there while I was there and interfered with our taking water from Lane slough on any occasion. I never knew of any dam being put across Lane slough during the time I was going to and fro from its head. I have no knowledge of it at any other time. I don't remember of ever seeing it."

There was much other testimony of similar import. The witnesses are positive as to the continuous diversion of the water from the St. Johns river for more than twenty years. What has been quoted shows conclusively that it was under a claim of right, as the parties diverting it exercised the usual acts of ownership. The diversion was open and notorious, effected by means of artificial contrivances which not only could be seen but were actually seen by representatives of appellants. The court below, from this long-continued use, might have presumed the knowledge and acquiescence of appellants, but it had the direct statements of the witnesses clearly revealing such knowledge and acquiescence. As the question of taxes is not involved, no element of title by prescription is wanting.

Complaint is made that the testimony as to interference is negative in its character, that from the declaration of the various witnesses for plaintiffs as to their want of knowledge or information concerning any opposition of defendants, it does not follow that the said diversion of the water was not challenged. It is not contended that the evidence is conclusive as to plaintiffs' claim, but it must be apparent that their showing, giving it full credit as we must, is as complete as is

practicable, or as is required to support the inference that the water was diverted for at least five years under a claim of right and without any interference or opposition on the part of appellants, but with their full knowledge and acquiescence.

The question whether or not the user is adverse or with the implied license of the owner of the servient estate is one of fact to be determined in the light of all the surrounding circumstances. (*Thomas v. England*, 71 Cal. 456, [12 Pac. 491].) In *Franz v. Mendoca*, 131 Cal. 205, [63 Pac. 361], it is held that "where the user of a way is shown to have been continuous for the full period of limitation, unexplained, without anything in the evidence or in the circumstances of the case to indicate the contrary, it may be presumed that it was under a claim of right and adverse to the owners of the land." (See, also, *Gurnsey v. Antelope Creek etc. Water Co.*, 6 Cal. App. 391, [92 Pac. 326], and cases therein cited.)

The result is not affected by the circumstance that the diversion was made by means of an artificial and a natural channel. As said in *Lower Tule etc. Co. v. Angiola etc. Co.*, 149 Cal. 498, [86 Pac. 1081]: ". . . A person who is making an appropriation of water from a natural source or stream is not bound to carry it to the place of use through a ditch or artificial conduit, nor through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel, or natural depression, which he may find available and convenient for that purpose, so long as other persons interested in such conduit do not object, and his appropriation so made will, so far as such means of conducting the water is concerned, be as effectual as if he had carried it through a ditch or pipe-line made for that purpose and no other."

In this respect there can be manifestly no difference between the appropriation of water under a claim of right and for the requisite time to ripen into a title by prescription and the case of the appropriation specifically provided for in the Civil Code. (Secs. 1415-1721.)

But if we interpret said stipulation of the parties as applying only to the waters in the Kaweah river at McKay point above the mouth of said Lane slough, as contended for by appellants, there is no ground upon which we would be warranted in reversing the judgment of the lower court.

Upon this theory of the stipulation it would be necessary for plaintiffs to prove that the use of the water diverted from the St. Johns river by means of said ditch and slough was under a claim of right for the statutory period, which we have already considered, and was enjoyed by plaintiffs or for their benefit or by their predecessors in interest, or else that they were prior appropriators of said waters together with the amount of said waters so appropriated. This is required by reason of the general denials of the answer and the specific allegation as to want of privity, to which we have already referred, and "that the said canal or ditch so excavated and made from the said St. Johns river to said Lane slough was not and never has been, a natural watercourse, and the plaintiffs herein have never diverted any water whatsoever from the said St. Johns river through or by means of said canal or ditch."

As to the proposition that the use was for the benefit of respondents, it is pointed out in their brief that "On the third day of November, 1877, the owners of the respective ditches now owned by plaintiffs organized themselves into a corporation known as the Kaweah and Mill Creek Water Company, and filed articles of incorporation thereof on said day. One of the main purposes of this corporation 'was to keep water in the Kaweah and Mill creek channel, the route to be adopted to be through Lane slough and any new cut the company may deem expedient to keep water in said Kaweah and Mill creek channel for irrigation and manufacturing purposes.' This company also acquired title on October 27, 1877, to the east half of the S. E. $\frac{1}{4}$ of section 2, T. 18 S., R. 26 E., upon which land, according to the answer, the canal or ditch was dug through which the water of the St. Johns river was diverted." James Evans testified that "this land was in possession of the Kaweah and Mill Creek Water Company ever since the eleventh day of May, 1882, and under its control for and on behalf of plaintiffs in this action up to the time that he left in 1891; that he came back in 1892 and was here until 1894, and it was still under their control; that said company didn't act for anybody else besides plaintiffs."

Alma Hall, a witness for plaintiffs, testified that in 1877 he went up to the head of Lane slough with Mads Johnson, Frank Duran, John O'Connor and others in the month of

November, to get water down through said slough; that they were there three days, three of them used scrapers, O'Connor for the Evans ditch and the others for the Oakes ditch. He further testified that the Kaweah and Mill Creek Water Company was turning water down for the benefit of the Evans, Watson, Fleming, Persian, Evans Extension, Oakes and Burch ditches.

From the foregoing and other testimony, some of which we have hereinbefore quoted, the court was entirely justified in concluding that the diversion of the water and its use were in behalf and for the benefit of plaintiffs. Moreover, as suggested by respondents, "plaintiff had possession of their ditches and water rights in March, 1902, when defendants obstructed the flow of the water into Lane slough, and are presumed to own such ditches and water rights in the absence of a showing by defendants to the contrary. (Code Civ. Proc., sec. 1963, subd. 11; *McGovern v. Mowry*, 91 Cal. 383, [27 Pac. 746]; *Zilmer v. Gerichten*, 111 Cal. 73, [43 Pac. 408]; *Kellogg v. King*, 114 Cal. 383, [55 Am. St. Rep. 74, 46 Pac. 166]; *Utt v. Frey*, 106 Cal. 396, [39 Pac. 807].)" Furthermore, it was admitted that plaintiffs own the ditches connecting with the Kaweah river and Mill creek, together with the water rights thereunto belonging. But it is clear that the right to the use of the water flowing through said Lane slough into said river is an appurtenance to said ditches. The water right, therefore, would follow the ownership of the ditches to plaintiffs.

In this connection it is to be observed that there was evidence also that when the water was low in the St. John river at the said point of diversion into Lane slough it would not reach the head of the Lakeside ditch by seepage or otherwise. It could not have been and was not used, therefore, by appellants. Hence the respondents would be prior appropriators, and appellants stand in the attitude of trespassers.

The evidence as to the amount of water appropriated was admitted without objection, and we cannot say that the trial court was not justified in acting upon it.

L. E. McCabe, a competent hydraulic engineer, testified to making measurements and calculations, and he reached the conclusion that "with the wing dam in there would be 64.38 cubic feet per second running into the slough." This evi-

dence was probably the best that was available, and since no counter showing was made by defendants, the court could scarcely have disregarded the testimony of McCabe.

Certain rulings of the court as to evidence are assailed, but even if erroneous, they are not of sufficient importance to justify a reversal of the judgment.

Alma Hall was asked on cross-examination this question: "Did you at any time attempt to take that dam out of Lane slough and were you prevented by these Lakeside people from doing so?" In his direct examination he had said nothing about this particular dam, and hence the ruling was probably correct, but at any rate he substantially answered it by stating that he did take out part of the dam during that summer, and he did not remember of seeing any of the Lakeside people up there during that year.

Burton Smith, a witness for the defendants, was asked this question: "Then, from the amount of water you saw there, you estimated it to be about seven cubic feet per second?" A. Yes, sir." To the question counsel for plaintiffs objected on the ground that the witness had not shown himself qualified to measure water. The objection was sustained and the answer was stricken out. In determining the competency of an expert witness the trial court has quite a wide discretion, and we are not prepared to say that it was abused in the present instance, although the witness had stated that "I had been accustomed to measure the water myself and to measuring and determining the water flowing in a stream and ascertaining the amount of cubic feet per second." In view of the objection, however, that was made, appellant should have gone more particularly into the facts disclosing the ability of the witness to estimate with some degree of accuracy the amount of water carried by the stream. But again, the question seems to have related to a particular date when the stream was observed by the witness, and there is no controversy that at times no water at all was flowing into the slough from the St. Johns and necessarily a very small quantity at other periods, and the answer of the witness would manifestly have not assisted the court in determining the maximum amount to which respondents were entitled.

The question, "Is it not a fact that from 1885 to the time you quit having anything to do with the conducting of water

through Lane slough that you took through Lane slough and were permitted to take through Lane slough, only enough water as in your judgment and in the judgment of the people representing the Lakeside Ditch Company and the St. Johns River Association was sufficient to equalize the water so that half of the water coming down the Kaweah river would run in the St. Johns river and half of it in the Kaweah river?" addressed to James Evans, manifestly called for his opinion, and was properly disallowed. His cross-examination took a wide range, and included every pertinent fact throwing any light upon the question whether the appropriation of the water was in pursuance of any understanding or otherwise.

The action of the court was clearly right in striking out as not responsive the answer of witness Bryan: "Well, the division was made there to keep the water in the Lakeside ditch as long as the water would reach the head of the ditch," to the question: "What was the division made then?" This did not call for the opinion of the witness as to the purpose for which the division was made.

The same suggestion will apply to William Dougherty's answer to the question: "What were you doing there at McKay point that year?"

Alma Hall was asked the question on cross-examination: "In 1896, isn't it a fact that there was plenty of water in the Kaweah and Mill creek for all these ditches which are plaintiffs' in this action without any water in Lane slough?" An objection was sustained on the ground that it was not proper cross-examination. In support of the ruling it is contended by respondents "that he was put on in rebuttal for the sole purpose of contradicting defendants' witnesses in regard to the interference of plaintiffs' use of the water, and this question was not properly directed to that fact," but whether this is so or not the question called for an opinion of the witness, and, besides, he had previously answered it by stating that at times there was and at other times there was not plenty of water "without the water from Lane slough."

James Evans was asked on redirect examination: "I suppose you know that these ditch companies, plaintiffs in this action, claimed that water all that time, claimed the right to use it?"

It was objected to on the ground "that the same was immaterial, irrelevant and incompetent and not redirect examination." The objection was overruled and the witness answered "Yes, sir."

In order to establish a title by "prescription" it was necessary, as we have seen, that the use was under a claim of right. This would ordinarily be shown by the acts, declarations and relation of the parties to the controversy. If the plaintiffs, during the time they were using the water, had openly declared that they claimed a right to the use of it, a witness with knowledge of that claim would be competent to testify to it. This may have been the position of Evans, and upon that assumption the question was proper. If the answer simply reflected his opinion from the acts of the parties, appellants should have shown that fact by further examination of the witness. Again, no other conclusion could have been drawn from the facts to which he testified. Hence, the ruling, if erroneous, was without prejudice.

There are some other points made by appellants but they are all of minor importance and do not justify any further attention. As already indicated, it is admitted by appellants that the decisive question in the case is the finding as to the use of the water in the requisite manner and for the statutory period to establish a title by prescription. As we read the record, there can be no possible doubt as to this point, and the judgment and the order denying the motion for a new trial are affirmed.

Hart, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 28, 1910.

[Civ. No. 683. Third Appellate District.—April 1, 1910.]

IRA HILL REED, Respondent, v. JOHN J. HICKEY and CHARLES LAMB, Appellants.

OPTION TO PURCHASE MINE—ACCEPTANCE—PART PAYMENT—DEED IN ESCROW—CESSATION OF OPTION—ENFORCEABLE CONTRACT.—Under an option to purchase a mine upon specified terms, permitting the holders thereby to prospect the mine for the vendor's benefit during the option, upon the acceptance of the terms of purchase specified and payment of part of the purchase money, and procuring the deposit of a deed in escrow to be delivered upon full payment, and the taking of full possession under the contract for the sole benefit of the purchasers, all option has fully ceased, and there is no continuing option as to deferred payments; but the vendor may enforce the residue of the purchase price, and upon full enforcement and payment thereof, the purchasers are entitled to the delivery of the deed placed in escrow.

ID.—EXECUTION OF CONTRACT BY VENDOR ALONE—PURCHASERS BOUND BY ACTS OF ACCEPTANCE.—It does not follow because the plaintiff, as vendor alone, executed the contract that it is not binding upon the defendants as purchasers. The contract being an agreement to sell upon the exercise of the option to purchase, the acts of defendants in making payments and taking full possession under the contract constituted a sufficient acceptance of its terms, and defendants became bound by it. The further signing of a supplemental agreement by an agent for the defendants evidenced a further acceptance of the contract by the defendants.

ID.—MUTUALITY OF REMEDY NOT REQUIRED.—Mutuality of contract does not require that there should be mutuality of remedies under it. Defendants could not by their depriving themselves by this breach of contract of the right to enforce a specific performance thereof deprive plaintiff, who had not broken the contract, of his right to enforce payment of the purchase money in full.

ID.—REMEDY TO REPOSSESS MINE NOT EXCLUSIVE.—The plaintiff was not confined to his remedy of repossessing the mine, upon defendants' breach, and after defendants have extracted a large quantity of gold from it, to its possible exhaustion.

APPEAL from a judgment of the Superior Court of Calaveras County, and from an order denying a new trial. N. D. Arnot, Judge.

The facts are stated in the opinion of the court.

Solinsky & Wehe, John Hancock, and S. C. Denson, for Appellants.

Nicol & Orr, M. H. Orr, Snyder & Snyder, and Ira Hill Reed, for Respondent.

CHIPMAN, P. J.—This is an action to recover the balance of the consideration mentioned in a certain contract for the sale of certain placer mining property situated in Calaveras county. Plaintiff had judgment, from which and from the order denying their motion for a new trial defendants appeal. The question now here rests chiefly upon the interpretation to be given to the agreement in the light of the circumstances surrounding the parties and their conduct and acts at the execution of the agreement and subsequent thereto.

It is set forth in the complaint that on April 29, 1907, and for many years prior thereto, plaintiff was the owner of the property in question, called the Reed Drift mine; that on that day one J. E. King was and had been the agent of defendants in negotiating for a contract for the sale and purchase of said mine, and upon that day plaintiff entered into an agreement in writing with said King, for said defendants, the material provisions of which are as follows: Reciting the fact of plaintiff's ownership and setting forth a description of the mine; the contract recites that second party "is desirous of an option to purchase said property for the agreed purchase price of \$36,000, based upon the privilege of sixty days from date in which to prospect by sinking a shaft from the surface and drifting therefrom to ascertain the course and extent of the lead on which said party of the first part is now breasting and milling the gravel taken out." It is then provided that in consideration of the faithful performance of the terms of the contract by the second party, as thereafter set forth, first party "covenants and agrees to sell and convey the said Reed mine to said party of the second part, at any time within said sixty days from the date of these presents, upon payments and conditions as follows." These conditions provide for a payment of \$10,000 on or before June 29, 1907; \$6,500 to be paid on or before September 29, 1907; \$6,500 on or before December 29, 1907; \$6,500 on or before March 29, 1908, the full and final payment of \$6,500.

to be paid on or before June 29, 1908. The contract then fixes the point upon the mine at which the prospecting shaft is to be sunk, and provides that "until the expiration of the sixty days' option hereby granted the right to continue the uninterrupted working and operating of said mine by said party of the first part and to the proceeds of the gravel taken out is agreed to, and that the said privilege of prospecting by said party of the second part shall in no manner interrupt or interfere with the working of said mine by said party of the first part"; and "all pay gravel taken out by the party of the second part while prospecting during the said period of sixty days shall belong to said party of the first part"; that all buildings, improvements and appliances placed upon the premises by second party "during said period of sixty days granted for prospecting" are to belong to said first party upon failure of second party to make the first payment provided for. It is then provided that upon payment of the first installment within said period of sixty days from date, first party will at once make and execute a good and sufficient conveyance of said mine, and deposit the same in escrow with the Bank of California, with instructions to hold the same during the life of the said agreement and deliver the same upon "payment of the balance of said purchase price at the times as herein stipulated, but if default be made in making any of said payments, or any violation of the terms or conditions of this agreement, to return said deed to the party of the first part." It was further agreed that upon receipt of the first payment, party of the first part "will at once turn over and surrender possession of said property to said party of the second part with the hoist, mill and all tools and appliances owned by him and heretofore used in working said mine; . . . and thereupon said party of the second part shall have the right and privilege of entering upon and into said Reed mine and of mining, prospecting and developing the same, and of taking out and working the gravel or any other mineral deposit, and extracting the gold contained therein for his own use and benefit." It is next provided that second party shall do the prospect work in a good and workmanlike manner at his own cost and expense, and contains certain provisions for protecting first party against liens or unpaid labor and materials. The contract also gives to the first party the privi-

lege of access to the mine and mill in order that he may know the character of the work being done and the extent of the pay gravel extracted. Time is expressly made the essence of the agreement, and it is provided "that a default in payment of either or any of the installments of said purchase price at the times and in the manner stated, or the failure to make monthly payments of the operating expenses in working said mine or to file with the party of the first part, on the tenth day of each month, a statement of such running expenses with vouchers, within a reasonable time thereafter, showing the payment thereof, shall at once abrogate this agreement, and its provisions shall no longer bind the party of the first part, and he may at once re-enter and assume possession and control of the whole of said described mining property, together with any and all machinery, buildings, tools, lumber, material, appliances and improvements either made or placed thereon by said party of the second part, and the same together with all payments of money on account of said purchase price shall be forfeited to said party of the first part as liquidated damages for the use and occupation of said property, . . . and all such machinery, buildings, tools, lumber, materials, appliances and improvements together with any and all such payments made of said purchase price shall revert to and belong to said party of the first part without legal recourse by said party of the second part."

It is averred that said King entered into said contract with plaintiff "as the representative of defendants and for them and as their agent, and he, said King, immediately after the execution of said contract, assigned and transferred all right therein and interest thereto to said defendants Hickey and Lamb; and they, said defendants Hickey and Lamb, thereupon entered into and upon said mine and commenced prospecting therein"; that on May 18, 1907, defendants notified plaintiff of their exercise of the option to purchase said mine at the price of \$36,000, payable to plaintiff in installments, at the times and in the amounts as in the said agreement specified, and on that day paid to plaintiff on account of said purchase price the sum of \$10,000, and then demanded that plaintiff at once make and execute to them a deed of the said mine and deposit the same with the Bank of California, with instructions to hold said deed during the life of the agree-

ment and to deliver the same to the defendants upon the payment made at said bank of the balance of said purchase price; that on said day, in response to said demand of defendants and in compliance with said agreement, plaintiff did make, execute and duly acknowledge a good and sufficient deed of said mine to defendants, and deposit said deed with said bank with instructions to deliver the same to defendants upon the payment of the balance of said purchase price, as provided in said agreement, and said deed has ever since been, and is now in and held by said bank under said instructions, ready for delivery to defendants upon the payment of the remainder of said purchase price; that upon said day plaintiff and defendants entered into an agreement in writing supplementary to the agreement hereinbefore set forth, by which it was agreed that plaintiff should remove all encumbrances upon said mine on or before September 29, 1907, and that if all such encumbrances were not so removed, the defendants should not be obligated to pay the second installment, or any other installments, until the title to said mine was clear of encumbrances, and it is averred that plaintiff did, prior to September 29th, cause to be removed from said premises all encumbrances, and the title thereto was on that day, and ever since has been and still is, clear of all encumbrances. It is next averred that on May 18, 1907, defendants entered into full and sole possession of all of said mine and commenced active mining operations therein, and so continued in the possession and the mining thereof, and during such mining operations extracted gold-bearing deposits therefrom of the value of upward of \$40,000, all of which defendants appropriated to their own use, and that upon August 29, 1907, defendants paid to plaintiff, upon said purchase price of said mine, the further sum of \$6,500, and that no other payments on account of said purchase price have been made, and there is unpaid the sum of \$19,500.

All the foregoing averments of the complaint are found by the court to be true, except it is found that the amount of gold extracted from the mine by defendants was \$33,540.55, and in that connection the court found that defendants had expended the sum of \$23,069.45. The date of the second payment is found to have been September 29th, instead of

August 29th, as averred and as provided by the said agreement.

It was further alleged and found by the court that defendants promised and agreed to pay plaintiff the said purchase price in installments of the amounts and at the times specified in said agreement of April 29, 1907; that subsequent to said date, at the request of defendants, plaintiff in writing extended the time for the payment of the third installment from December 29, 1907, to January 28, 1908, but defendants failed and refused to pay said sum on or before said January 28th, and have since refused to pay said sum, or any part thereof. That defendants continued in sole possession of the mine and extracting gold-bearing deposits therefrom until January 28, 1908, at which date they suspended mining operations and notified plaintiff that they refused to pay said sum of \$6,500, payable, as aforesaid, on January 28th, and refused to proceed with said agreement or to keep or perform its terms, or to make plaintiff any further payments on account of the unpaid purchase price of said mining claim; that on said twenty-eighth day of January defendants suspended work, and attempted to surrender possession of the mining claim to plaintiff, claiming that they were relieved from any further payments on account of the purchase price agreed to be paid for said mine, but plaintiff refused to accept surrender of said mining property, and demanded that the defendants keep and perform their said agreement for the purchase of the said mine and pay to plaintiff the remaining portion of said purchase price, to wit, the sum of \$19,500, which said sum, or any part thereof, defendants refused to pay; that plaintiff has fully kept and performed all the conditions of the agreement on his part, and, ever since the making of said agreement, has been able, ready and willing, and is now ready, able and willing, to cause delivery of said deed to be made to said defendants upon the payment to him of the purchase price of said mining property. It was also alleged in the complaint and found by the court that the said mine is a gravel mine operating through shafts, drifts and tunnels run from the surface, and to prevent injury thereto it is necessary that the same be drained and kept drained, the tunnels and drifts to be timbered and kept timbered and in proper repair, and the mine drained and

kept free from water, and that unless such care is given the said mine, it will be destroyed and great and irreparable injury and damages will be done thereto.

The complaint also alleges that plaintiff has a lien upon the said property and the right to resort to the same in satisfaction of his said claims, and also avers that in order to preserve the said property a receiver should be appointed to take charge thereof. The court makes no findings upon these averments, and they seem not to have formed an issue in the case and need not be further noticed.

A general and special demurrer to the complaint was overruled and defendants filed an amended answer denying many of the averments of the complaint, but admitting the execution by said King of the contract set forth in the complaint and its assignment to defendants; they aver that they took no part in the negotiations relating to the contract of purchase and took possession only as the assignee of said King, "and with the understanding that the same was a bare option giving them the right to purchase the said property upon the payment of the purchase price as mentioned therein, and subject only to the condition that if the purchase price was not paid as therein provided, that they should have to surrender the possession of the said property and forfeit all rights thereto and all payments theretofore made; and that they never, at any time, promised to pay any part of said purchase price or to become indebted to said plaintiff in any sum of money whatever." They also allege that they were led to believe by plaintiff himself that said contract was a mere option and contained no personal obligation to pay any part of said purchase price except as a condition of the getting of a deed, and then only at the option of the holder, and that plaintiff has always treated the same as a mere option. They deny that the said King entered into said contract as the representative of said defendants, or either of them. They deny that they notified plaintiff of their exercise of the option to purchase said mine, and allege that they merely took possession of said property under the assignment of said contract, and paid the sum of \$10,000 in accordance with its terms. The court found the foregoing averments of the answer to be untrue. The answer sets forth the escrow agreement and avers that the deed therein referred

to was not to be regarded as the deed of plaintiff, and was not to be delivered to defendants "unless they should exercise their option to pay the balance of said purchase price, and that said deed never was made or executed to these defendants, or either of them, and that it was always understood that the forfeiture provided in said contract was the only recourse which said plaintiff should have against these defendants, or either of them"; and upon this construction of the escrow agreement it is denied that plaintiff, in compliance with the demand of defendants, or either of them, executed the deed referred to in the complaint. This escrow agreement is dated May 18, 1907, executed by plaintiff, and recites the delivery to the bank of a grant, bargain and sale deed by plaintiff and his wife to defendants, conveying certain property and mining claims therein described and directing the bank to hold the deed in escrow under instructions calling for all of the various payments, excepting the first installment, at the dates as mentioned in said contract of purchase and sale, and, upon payment of the same "you will deliver the said inclosed deed to said John J. Hickey and Charley Lamb or their assigns, upon their order." It recites also that these instructions were given pursuant to an agreement entered into between the plaintiff and King on April 29, 1907, which was thereafter assigned to defendants, and also in pursuance to the terms of a supplemental agreement of May 18th between plaintiff and defendants, in which it is recited that plaintiff has covenanted to convey good title to said properties and to have an abstract of title prepared by a law firm named on or before September 29, 1907; and it is provided that "if said abstracters should certify that the title to said property is clear in all respects, and on or before the said twenty-ninth day of September, 1907, the said sum of \$6,500 is not paid to my account, or if any of the other installments are not paid as hereinbefore provided, the said inclosed deed is to be redelivered to me at my request; if, however, said abstracters certify that the title to said property is not clear, then said deed is to remain with your institution until a further order is made upon you, signed jointly by myself and John J. Hickey and Charley Lamb or their assigns." The court found against the defendants upon their averments as to the execution of the deed and the conditions

upon which it was executed, as defendants alleged to have understood it, and found the escrow instructions to be as set forth above.

The answer denies that the supplementary agreement of May 18, 1907, was as set forth in the complaint, and avers that such supplementary agreement was entered into by plaintiff and defendant Hickey, and it is set forth in the answer. It recites the contract between plaintiff and said King; that King has assigned his right and interest therein to the party of the second part (John J. Hickey); that party of the second part has this day paid to the first party the sum of \$10,000 in accordance with the terms and conditions of said agreement, and states that "Whereas, the said party of the second part is desirous that all encumbrance of all kinds whatsoever shall be removed from the property and premises particularly described in the said agreement: Now, therefore, in consideration of the premises and of the payment of the sum of \$10,000 as hereinbefore provided, the said party of the first part agrees to remove all of said encumbrances against the said Reed Drift mine in said annexed agreement particularly described, on or before the 29th day of September, 1907, the date of the payment of the second installment of said purchase price, and in the event that all of said encumbrances are not removed on or before the 29th day of September, 1908, then the said party of the second part hereto shall not be obligated to pay the said second installment on said date and shall not be required to pay said second installment or any future installment of said purchase price and in the event that all of said encumbrances are not removed on or before the 29th day of September, 1907, then the said party of the second part hereto shall not be obligated to pay said second installment on said date and shall not be required to pay said second installment or any future installment of said purchase price until the title to said herein described property and premises is absolutely clear of all encumbrances whatsoever." It is then averred in the answer that at the time of the execution of this supplementary agreement the plaintiff stated "that he would remove the encumbrances so that in case that said defendants exercised the option of making any future payment the property would be free and clear from such encumbrances, and promised that the option for making

any future payments would be extended until such time as such encumbrances were removed, and to put the matter beyond question promised to put the same in writing, whereupon the said instrument was executed and at the time that it was executed it was understood between all parties thereto that the same was not to add any condition whatever to the said original contract of said 29th day of April, 1907, set out in said complaint, but was merely to be an extension of the time within which said defendants might exercise the option to make any future payments, and in so far as the said instrument as written includes any further promise or condition, if it be construed to contain such, it was entered into by mutual mistake of said parties thereto and was not intended to be such, and it was so understood by said plaintiff and said defendants, and it was never understood by any of the parties to said agreements that any of said payments should be binding upon said defendants or either of them but that each payment was to be made or not at their option, and that said instrument last mentioned and said contract set out in said complaint were not intended to be a contract of purchase at all but merely an option, as aforesaid, and that said plaintiff during all of the negotiations pending the execution of said instruments led defendants and each of them to believe that the same was an option."

The finding of the court is squarely against the aforesaid averments as to the supplemental agreement and as to the understanding between the parties, and the court finds that there was no mutual or other mistake made by the parties in reference to said supplemental contract.

It is also averred in the answer that plaintiff was a lawyer, and defendants relied upon his knowledge of said matters and upon his said representations in respect to the construction to be placed upon said instruments and each of them. The court found that plaintiff was a lawyer, but that it was not true as to the other of these averments.

The findings of the court have support in the evidence, from which it appeared: That said King was known by plaintiff and defendants to be a mining promoter, and that in obtaining the contract in question he was acting for defendants, who were partners in the enterprise, each acting for both, and was in fact to receive compensation for his services from

both plaintiff and defendants. On April 21, 1907, King first spoke to plaintiff about having defendants in view as possible purchasers of the property, if sufficient time was given to prospect it, and plaintiff then gave King a written memorandum in which he stated: "If on next Friday, April 26, 1907, Joseph King, with a Mr. Lamb, will visit the Reed mine, that I will agree to sell the latter the said property at the agreed price of \$36,000 and this offer to hold good for ten days after said Lamb appears upon the ground," to which was attached a further memorandum to the effect that if King effected a sale, he would be "entitled to a commission of ten per cent pro rata on payments of said purchase price as made." Some time before this King had met defendant Lamb at Stockton and informed him of the property and that plaintiff would give a sixty day option for prospecting. Lamb said he would see his partner (admittedly defendant Hickey), and a short time thereafter and prior to April 29, 1907, both defendants visited the mine and commenced prospecting. King and defendants had an understanding prior to the making of the contract of April 29th, as to its disposition when made, and King's compensation by defendants for obtaining it was agreed to, and was later reduced to writing by which they were to pay him five per cent on the purchase price of \$36,000. It appeared that the day following the execution of the contract defendant Hickey made objection to certain words relating to the removal of machinery put upon the property by defendants and they were erased. From the time defendants went upon the property, prior to April 29th and until May 18, 1907, they continued to investigate and prospect the mine at their own expense. During this time plaintiff was working the mine and had developed better paying gravel, and was taking out from one to two thousand dollars per week, which was known to defendants. Without waiting the sixty days given in the contract for prospecting the mine defendants informed plaintiff, on May 18th, that they held the contract and were "ready to do business." Hickey and King met at the office of defendants' attorney, Hancock, on May 18th, and plaintiff was present. Plaintiff testified that Hickey and Hancock said "they were ready to buy the mine, make the purchase. Mr. Hancock requested me to sign a deed. Mr. Hancock said the parties—that Mr. Hickey, before

they would accept it, would expect a good title to the mine and that he wanted time to prepare it and that he would arrange it." The mine was encumbered at the time and defendants wanted the title cleared on or before the next payment. Mr. Hancock prepared the deed, the so-called supplementary agreement of May 18th to clear the property of debt and also the escrow instructions mentioned in the pleadings, and plaintiff executed the documents as agreed upon, and he subsequently paid off the encumbrances and cleared up the title and deposited the abstract in the Bank of California, as required of him, showing the title to be clear. On May 18th, when the matters just mentioned were concluded, defendants paid the first installment of \$10,000; plaintiff cleaned up his mill and workings and surrendered full possession to defendants, who commenced at once mining operations at the point where plaintiff had been working, and as shown by their books, defendants took out of the mine the sum found by the court (\$33,540.55) and appropriated it to their own use; they continued working the mine and on September 28, 1907, paid the second installment of the purchase price. The third installment fell due December 29, 1907, but at defendants' request an extension of the time in which to make this payment was given them, and plaintiff and defendants entered into a written agreement extending the time to January 28, 1908, changing the paragraph of the original contract to read: "Third: six thousand five hundred (6500) dollars to be paid on or before the 28th day of January, 1908." On January 28, 1908, defendants notified plaintiff in writing in which they said: "We hereby give you notice that on this 28th day of December, 1907, we surrender and give up and do hereby deliver to you possession of your property," etc. Plaintiff replied, refusing to accept the surrender of the property and demanding payment of the unpaid amounts due. So far as appears, defendants at no time until January 28, 1908, claimed that they were holding the property under a mere option to purchase.

Respondent claims that the contract of April 29th was one of sale and purchase, and while it gave defendants an option for a definite time and specific purpose, to wit, sixty days in which to prospect and determine whether they would purchase, that upon the acceptance of the offer of sale thereby

made to defendants, the payment by them of the first installment of the purchase price, entry into possession of the property after demand for the execution and delivery in escrow of a good and sufficient deed, it ceased to be a mere option, and became and continued to be a valid binding contract, obligatory according to its terms, upon both parties thereto, and that plaintiff, having fully performed on his part, has his action for the unpaid purchase price of his property.

The judgment of the court was that plaintiff recover from defendants the sum of \$19,500 and costs of suit, and that on payment thereof to plaintiff "defendants shall be entitled to have and receive from the Bank of California the deed placed with said bank in escrow by plaintiff as in the findings herein set forth."

It seems to us free from doubt that the findings and judgment are fully sustained by the evidence and that respondent's view of the contract is correct.

Appellants contend that the contract was a continuing option which was renewed as each payment was made and continued until the next payment. We cannot agree to this interpretation of the contract. By its terms the option was limited to sixty days, during which time the vendees had the right only to prospect the mine at a particular point, but any gold taken out was to belong to the vendor. When, however, the vendees became satisfied, as they appear to have been from the results of the vendor's working of the mine during the continuance of the option period, that they preferred to work the mine for profit rather than be confined to prospecting it, they changed their attitude as prospectors and became operators and workers of the mine; they ceased prospecting at the point designated; announced their intention to purchase; paid the first installment a month before it was due, after requiring the vendor to cease mining and to surrender full possession to them with the privilege of retaining all the gold mined by them; and the evidence is that \$20,000 was taken out up to the time the second payment became due. It is unreasonable to suppose that the vendor intended, when he surrendered possession to the vendees, to permit them to appropriate all the gold they might mine and yet not be obligated to make the payments agreed to be made. Under such a construction of the contract, the supplementary agree-

ment and the instructions as to the escrow, the vendees could have decided on September 28th not to take the mine, and without making the second payment could have retained the \$20,000 taken out. We do not think that the contract compels or would reasonably warrant such a construction. The so-called supplemental agreement refers to the payments as to be made upon the "purchase price," and it provided that if the vendor failed to remove the encumbrances by a stated time, the vendees should "not be obliged to pay the said second installment . . . or any future installment of said purchase price until the title to said described property and premises is absolutely clear of all encumbrances whatsoever." The implication here is very strong that the vendees would be and were obligated to pay the installments as they became due if the title was made clear. And they so acted when the second installment fell due. Of course, the vendor could have made the improvident contract contended for by the vendees, but we do not think he so intended or that the contract made by him can reasonably be so construed. The "agreed purchase price" was expressly mentioned as \$36,000, based upon a sixty day option in which to prospect the mine, and the agreement was "to sell and convey the said Reed mine to second party, at any time within sixty days . . . upon payments and conditions as follows." Nowhere in these conditions is any mention of an option, but throughout the contract the payments to be made are upon the "purchase price." Before the sixty days expired the vendees availed themselves of the right to purchase, and there is nothing in the record to show that they did so merely as optionees with a continuing right to buy or not to buy as they might elect. Their entire conduct, as well as that of the vendor, shows that they were acting as purchasers.

Appellants speak of the contract as unilateral, and for that reason not binding upon them to purchase. It does not follow that because plaintiff alone executed the contract it is not binding upon defendants. If the contract was an agreement to sell and not a mere option, as we think is true, and defendants went into possession and made payments under it, such acts were a sufficient acceptance of its terms and defendants became bound by it. (*Benson v. Shotwell*, 87 Cal. 49, 53, [25 Pac. 249].) Besides, defendants signed the so-

called supplemental agreement, i. e., defendant Hickey signed it for defendants, which evidenced a further acceptance of the contract of April 29th. Appellants cite *Gordon v. Swan*, 43 Cal. 564, as decisive of their contention. We do not so understand that case. The contract there was for the sale of the entire stock of a corporation to defendants. The contract recited that the corporation was the owner of a vein of copper ore; that the first parties were desirous of selling their respective shares; that the parties of the second part (defendants) were "desirous of making improvements on the said mine, and erecting smelting works for the purpose of reducing the ores of said mine, and of eventually making a purchase of the shares of stock of the parties of the first part and of the mine, if the tests which they shall cause to be made prove satisfactory." The purchasers were to pay \$50,000 at the end of six months from the date of the agreement and possession given and similarly two further payments of \$50,000 at intervals of six months, failing in which they were to forfeit their improvements made in and about the mine, and thereupon first parties were to take peaceable possession. The court said: "It cannot be claimed that it was the true import of the contract that this large sum of money was to be paid for a brief possession of the mine, or for the privilege of erecting furnaces and testing the value of the ore. . . . It seems to be clear, from the terms of the instrument, that the purchase should be at defendants' option. It recites that the defendants are desirous 'of eventually making a purchase of the shares of stock . . . and of the mine, if the tests which they shall cause to be made prove satisfactory.' " In that case the defendants had a comparatively brief time in which to make a large outlay of money for the purpose of testing the mine, and their only right was to go into possession for that purpose. It was not possible in this character of mine to do this at a profit or to work the mine for profit. Had they made their test and at the end of six months informed the vendors of their intention to purchase and had paid the first installment of \$50,000, we would have had a case somewhat similar to the present one and the conclusion of the court might have been different.

Some suggestion is made by defendants that because of their breach of the contract they could not have enforced its

specific performance, and hence its mutuality was destroyed. We see no merit in this contention. Mutuality of contract does not require the same remedies under it. Defendants could not by their depriving themselves of the right to specific performance take from plaintiff his right to recover the unpaid amounts due under the contract. Where both are bound by the agreement either may pursue such remedies, for its enforcement as are open to him and these need not be identical. Nor was plaintiff confined to his remedy of repossessing himself of his mine upon defendants' breach and after defendants may have extracted a large quantity of gold from it to its possible exhaustion. (*Wilcoxson v. Stitt*, 65 Cal. 596, [52 Am. Rep. 310, 4 Pac. 629]; *Brickell v. Atlas Assur. Co.*, 10 Cal. App. 17, [101 Pac. 16].)

Some alleged errors of law are called to our attention, but defendants say in their brief that "a decision on them favorable to appellants would be of but little avail should the court hold against appellants as to the construction of the agreement, for if it is held that the contract evidenced a promise to pay the balance of \$19,500, such decision will end the case." For this reason "appellants do not seriously urge the objections."

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 29, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 26, 1910.

[Civ. No. 719. Third Appellate District.—April 1, 1910.]

FRANK CHIAFULLO, by His Guardian ad Litem, ANTONIO CHIAFULLO, Respondent, v. MOSES SCHWAB, Appellant.

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT—NONAPPEARANCE OF APPELLANT—PRESUMPTION—VEXATIOUS APPEAL FOR DELAY—DAMAGES.—Upon a motion to dismiss an appeal for failure to file the transcript within the time limited, and for damages for a vexatious appeal for delay, where, after the service of the appellant with notice of the motion, the appellant fails to respond, and no excuse appears for the delay, it must be assumed that the purpose of the appeal was as stated in the motion of respondent, and the appeal will be dismissed, with damages assessed against the appellant.

MOTION to dismiss an appeal from a judgment of the Superior Court of Yuba County. Eugene P. McDaniel, Judge.

The facts are stated in the opinion of the court.

Brittan & Raish, for Appellant.

W. H. Carlin, for Respondent.

BURNETT, J.—This is a motion to dismiss the appeal on the ground “that more than forty days have elapsed since the taking of said appeal and no transcript on appeal has been prepared, served or filed,” and respondent also asks the court to assess damages for the “taking of a vexatious appeal for delay.” The notice of appeal was given and filed on January 13, 1910, and an undertaking was filed on the same day. Nothing further seems to have been done in the prosecution of the appeal and no excuse is offered for the delay. The notice of the motion to dismiss was given on March 6th and appellant did not appear at the hearing. Under the circumstances we must assume that the purpose of appellant in taking the appeal was as stated by respondent.

The appeal is therefore dismissed, with damages against appellant assessed at \$30.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 843. Second Appellate District.—April 2, 1910.]

JOHN H. MCGOWAN, Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, County of Los Angeles, W. P. JAMES, Judge of said Superior Court, and H. A. PIERCE, Justice of the Peace, in and for Los Angeles Township, etc., Respondents.

WRIT OF REVIEW—JURISDICTION OF SUPERIOR COURT TO DISMISS APPEAL FROM JUSTICE'S COURT—ERRONEOUS ACTION.—A writ of review will not lie to annul the action of the superior court in dismissing an appeal from the justice's court taken thereto on questions of law and fact, however erroneous and arbitrary the action may be; since the superior court has jurisdiction as fully to hear and determine a motion to dismiss the appeal as it has to determine the cause upon its merits.

APPLICATION for writ of review to annul an order of the Superior Court of Los Angeles County, dismissing an appeal taken from the justice's court thereto on questions of law and facts. W. P. James, Judge.

The facts are stated in the opinion of the court.

Hanson, Hackler & Heath, for Petitioner.

THE COURT.—Assuming that the matters and facts set forth in the petition disclose arbitrary action on the part of the superior court in dismissing an appeal regularly taken from a justice's court upon questions of both law and fact, and which appeal was then pending in said superior court, by which order it divested itself of jurisdiction and prevented appellant from having a hearing of such cause upon its merits, we are then confronted with the precise question involved in *Buckley v. Superior Court*, 96 Cal. 119, [31 Pac. 8], wherein our supreme court has said, referring to the superior court, "it has jurisdiction to hear a motion to dismiss the appeal as fully as it has jurisdiction to hear and determine the cause upon its merits; and to erroneously dismiss the appeal is no more jurisdictional than to erroneously decide the merits of the cause." While we are much impressed with the reasoning employed in the former case of

Hall v. Superior Court, 68 Cal. 25, [8 Pac. 509], wherein it is said, "that court [the superior court] can neither give to itself jurisdiction by holding an insufficient undertaking sufficient, nor divest itself of jurisdiction by holding a sufficient bond insufficient," nevertheless, we feel ourselves bound by the subsequent ruling in *Buckley v. Superior Court*, *supra*, which, while the opinion of a divided court, has never as yet been directly overruled or modified.

Adopting, then, as we feel ourselves bound to do under the circumstances, the rule laid down in the later case, this application must be denied.

Application for writ denied.

[Civ. No. 634. Third Appellate District.—April 6, 1910.]

T. M. BURNS, Respondent, v. FRANK J. CASEY, Appellant.

STREET IMPROVEMENT—DECREE FORECLOSING LIEN—APPEAL—ABSENCE OF EVIDENCE—UNTENABLE OBJECTIONS TO DESCRIPTION IN RESOLUTION—AFFIRMANCE.—Upon appeal from a decree foreclosing the lien of a street assessment upon plaintiff's property for a street improvement under the Vrooman act, taken without a bill of exceptions or the evidence in any form, it is held that the objections of appellant to the insufficiency of the description of the work in the resolution of intention are without substantial merit, and that the judgment must be affirmed.

ID.—GENERAL RULE AS TO SPECIAL PROCEEDINGS IN INVITUM—STRICT CONSTRUCTION—STREET PROCEEDINGS—PRACTICAL ABSURDITY NOT REQUIRED.—Although, as a general rule, special proceedings for the assessment and taxation of property for special purposes are in *invitum*, and must be strictly followed, yet the laws authorizing assessments for street improvements and other improvements necessary to the welfare of the community are not supposed to be so strictly construed as to render them practically nonsensical and nugatory.

ID.—SUBSTANTIAL COMPLIANCE WITH STREET LAW—PROPER NOTICE.—A substantial compliance with the provisions of the street law ought to be all that should be required, where property owners have been given such notice, in form required by law, of the proposed im-

provement as will put them in possession of fairly accurate knowledge of the character and extent of the work to be done, and of a reasonable approximation of the detailed and total cost of the improvement.

ID.—FAILURE TO OBSERVE IMMATERIAL TECHNICAL REQUIREMENTS—ASSESSMENT NOT INVALIDATED.—In such case, no assessment ought to be nullified, and the contractor forced to suffer a heavy loss, or perhaps made a bankrupt, merely because of the omission of the authorities to observe some immaterial technical requirements of the law authorizing the work.

ID.—FOUNDATION FOR CURBS, GUTTERS, ETC.—SPECIFICATIONS—"TAMPING EARTH"—DISCRETION OF SUPERINTENDENT—"SELECTED EARTH"—"CRUSHED ROCK."—A specification that the foundation for the curbs, gutters and round corners shall be laid by "tamping the earth" upon which they are to rest is clear and definite; but a discretion in the superintendent of streets to determine, as the result of digging, whether "selected earth material" or "crushed rock" shall be necessary is reasonable, and cannot invalidate the assessment.

ID.—ABSENCE OF EVIDENCE UPON APPEAL—DIFFERENCE IN COST NOT SHOWN.—There being no evidence upon appeal as to the difference in the cost of obtaining "selected earth material" and "crushed rock," and such difference being a question of fact according to the circumstances under which either is obtainable, there is no basis upon which the judgment can be reversed on account of the discretion vested in the street superintendent.

ID.—QUESTION NOT PREDETERMINABLE BY CITY COUNCIL.—The question whether the earth in which the foundations of the gutters, curbs and round corners are to be laid was naturally of sufficient compactness and strength to be suitable for that purpose, or whether "selected earth material" or "crushed rock" would be required, could not be determined by an inspection of the surface, and was not therefore subject to predetermination by the city council.

ID.—EVEN SURFACE OF STREET—USE OF "SUITABLE" EARTH MATERIAL.—A specification requiring the contractor to bring the surface of the street to a smooth and even grade by the use of "suitable" earth material is not subject to just criticism by the use of the word "suitable." If that word were omitted, it would be implied in the obligation imposed upon the contractor, and it is not made less certain by inserting that word.

ID.—ALTERNATIVES IN MACADAM AND CONCRETE—MATERIALS FOR CRUSHED ROCK—QUESTION OF FACT—DIFFERENCE IN COST.—There being nothing in the record to show any difference in the cost between the materials of cobbles, trap and basalt, out of which the macadam and concrete may be constructed, this court cannot take judicial notice of any difference in the cost of such materials, the only difference being a question of fact as to which might be more

readily accessible or procurable than the others in sufficient quantity to do the work.

ID.—LOCATION OF CONCRETE CATCH-BASIN—DETERMINATION BY CITY SURVEYOR—COST NOT AFFECTED.—The fact that the location of a concrete catch-basin to be constructed by the contractor was to be determined by the city surveyor is not material, where the construction of the catch-basin is minutely described, and it does not appear that its location at any particular point would increase or diminish the cost of its construction.

ID.—LINES AND LOCATION OF CURBS AND GUTTERS NOT SPECIFIED—MATTER OF COMMON KNOWLEDGE.—The fact that the lines and locations of the curbs and gutters are not specified does not render them uncertain. It is matter of common knowledge that curbs must be placed at one of the edges of a street, and that they form the inner side of a gutter.

ID.—DISCRETION OF CONTRACTOR AS TO METHOD OF MIXING CEMENT—USE OF HAND OR MACHINE.—Where the standard of concrete is the same, the discretion given to the contractor to construct it by hand or by machine simply gives him discretion as to the method of laying the concrete of that standard.

ID.—INVALID POWER CONFERRED UPON CITY SURVEYOR—POWER OF ADJUDICATION UNEXERCISED OR ATTEMPTED.—The judicial power conferred upon the city surveyor to make a final adjudication of any misunderstanding or dispute as to the interpretation of the contract is invalid and void; but it is harmless where there was no attempt at the exercise of such power and no occasion arose calling for its exercise.

ID.—VALIDITY OF DISCRETION CONFERRED.—The validity or invalidity of power or discretion conferred upon the county surveyor or the superintendent of public streets depends upon its nature. The giving of discretion to some person as to matters of detail in construction is inevitable in every street improvement, if no power is improperly delegated.

APPEAL from a judgment of the Superior Court of Sacramento County. C. N. Post, Judge.

The facts are stated in the opinion of the court.

A. L. Shinn, C. G. Shinn, and Carl L. Shinn, for Appellant.

White, Miller & McLaughlin, for Respondent.

HART, J.—This is a suit for the foreclosure of a lien arising upon an assessment of the property of the appellant,

situated in the city of Sacramento, for the improvement of the street upon which said property abuts.

A decree foreclosing said lien and authorizing the sale of said property for the satisfaction of the said assessment, costs, etc., was entered, and this appeal is brought here by the defendant, Casey, from the judgment, unaccompanied either by a bill of exceptions or the evidence in any form.

The legality of the assessment is challenged upon the alleged ground that the board of trustees of the city of Sacramento never acquired jurisdiction to order the work to be done. This contention is founded upon an alleged insufficient description in the resolution of intention of the proposed improvement—that is, that with regard to the description of the work to be done, there were material defects in the specifications, which were made a part of the resolution of intention.

Section 3 of the so-called “Vrooman street law” (Stats. 1905, p. 64) provides: “Before ordering any work done or improvement made which is authorized by section 2 of this act, the city council shall pass a resolution of intention so to do and *describing the work.*”

The following are the alleged fatal defects in the specifications upon which we are asked to render a judgment invalidating the assessment:

1. “Curbs, gutters and round corners are to be constructed of concrete in accordance with plans attached, and in the following manner: A proper foundation shall be prepared by thoroughly tamping the earth upon which they are to rest, and if necessary, in soft or yielding ground, crushed rock or selected earth material shall be deposited upon the foundation and thoroughly compacted.”

2. “The street shall be brought to a smooth and even surface conforming to the required cross-section of the subgrade by excavating all places above grade and filling the depression with suitable earth material.”

3. “The crushed rock shall be of the harder quality of cobbles, basalt or trap, free from loam, clay or shale.”

4. “The rock used in concrete must be of the harder quality of cobbles, basalt or trap, free from loam, clay or shale or other inferior material.”

5. "A concrete catch-basin not exceeding five (5) feet in depth will be constructed at a point to be designated by the city surveyor."

6. "If the mixing is done by hand, the sand and cement must be carefully measured and thoroughly mixed while dry upon a tight platform, after which sufficient water applied in a spray will be added during subsequent mixing to convert it into a uniform stiff mortar. Then to the required amount of broken rock evenly spread upon a platform and thoroughly drenched with water, the mortar shall be added and the whole mass turned over at least three (3) times with shovels when every piece of rock shall be completely coated with mortar.

"If a machine is used for mixing, it must be of a standard and approved type and the concrete so mixed shall be at least equivalent to that mixed by hand as above described."

The general objection to all those parts of the specifications complained of here is that they are so indefinite and uncertain in certain particulars that they necessarily vest in the superintendent of streets an inordinate and unwarranted amount of discretion as to the character or nature of certain materials with which the street was to be improved, as well as to the manner in which portions of the work were to be done.

It is just as well in the beginning to declare it to be our judgment that not a single one of the objections to the assessment urged here possesses substantial merit.

It is, of course, well settled and well understood that proceedings leading to the assessment and taxation of property for special purposes, as contradistinguished from those general burdens necessarily imposed alike upon all property for the support of state and municipal governments, are *in invitum*, and, in order to validate a tax imposed for special purposes, the law authorizing such proceedings must be strictly followed. But the laws authorizing assessments for special purposes—for the improvement of streets, building of sidewalks and sewers and other like improvements necessary to the comfort and welfare of inhabitants of local communities—are not supposed to be so "strictly" construed as to render them, practically, nonsensical and nugatory. A substantial compliance with their provisions ought to be all that should be required, by which we are to be understood as meaning that,

where property owners and bidders for the work have been given such notice, in form required by law, of the proposed improvement as will put them in possession of fairly accurate knowledge of the character and extent of the work to be done and of a reasonable approximation of the detailed and total cost of the improvement, and the work has been well performed, then in that case no assessment ought to be nullified and the contractor thus forced to suffer a heavy loss, or perhaps made a bankrupt, merely because of the omission by the authorities to observe some immaterial technical requirements of the law by whose provisions alone the work is authorized.

The specific criticism involved in the first objection here is that there is delegated by the board of trustees to the superintendent of streets the power of determining what should constitute a "proper foundation" for the curb, gutters and round corners, and further, that that official is also invested with the discretion of deciding whether there should be used in the preparation of said foundation "crushed rock" or "selected earth material." The contention is that the street superintendent was thus given power, by the exercise of which he was able to increase or diminish the cost of the work at his will.

We do not so read that portion of the specifications objected to. It is first therein specifically provided how and in what manner such foundation should be prepared in order to constitute it the "proper foundation" contemplated and provided for by said portion of the specifications. As seen, the language is: "A proper foundation shall be prepared by *tamping the earth upon which they* (curbs, gutters and round corners) *are to rest,*" etc., and thus far the description of the work to be performed is about as definite and specific as language could make it. What clearer terms in the English language could be employed to prescribe to the contractor the absolute duty of so tamping and thus hardening the earth as to make the foundation stable and durable? And that is all that that part of the specifications called for, and we do not see that it could have called for either less or more. As to the second point under the first objection, that to the street superintendent unauthorized power, fatal to the assessment, was delegated by committing to his judgment or volition the determination whether, according as he found the condition

of the earth, "crushed rock" or "selected earth material" should be used in the preparation of the foundation, one answer is, and we think it is conclusive, that, the evidence not having been brought up, there is no showing here that there was any material difference in the cost between the two kinds of materials from which the superintendent was authorized to exercise a selection. Besides, we think that, in any event, it was not only a reasonable, but a necessary, discretion to vest in the street superintendent. To determine whether the ground or earth upon which the foundation was to be laid was "soft or yielding," required investigation, as by digging into the soil a sufficient depth to ascertain whether it was naturally "soft or yielding," thus requiring crushed rock, or selected earth material, according as to the degree or extent of that quality it possessed, or whether it was naturally sufficiently compact in itself to require neither crushed rock nor selected earth material.

In *McCaleb v. Dreyfus*, 156 Cal. 204, [103 Pac. 924]—the latest expression of the supreme court involving an interpretation of the provisions of our street law—it is said:

"In awarding a contract for street work it is quite apparent, since the surface of the ground is exposed, that there may be an accurate predetermination of the amount and character of material to be used. It is unnecessary, therefore, to delegate any discretion in this matter to the street superintendent. Such was the condition in *Perine etc. Co. v. City of Pasadena*, 116 Cal. 6, [47 Pac. 777], (a street work case), where the specifications required that 'the contractor shall put in such extra concrete as the superintendent of streets and the city engineer may require, and in such places and in such form as they may designate.' It was easily susceptible of predetermination upon the part of the council whether any extra concrete was required at all, and, if so, the quantity and the place of use. This delegation, therefore, was held to be unreasonable. But where, as here, the work is the construction of a sewer, involving, first the digging of the trench, and, second, the placing of the sewer upon a durable foundation, it is apparent that but one of three courses can be pursued in the letting of the contract." The court then proceeds to point out three different methods by which a contract for the building of a sewer may be let, and showing that

the better course for the owners of property affected by the assessment is that objected to in that case, where the challenged specifications read: "If, in the judgment of the city engineer, it shall be necessary to form any portion of said foundation [of the sewer] of concrete, said concrete shall be paid for as extra work at the price per cubic yard mentioned in the contract." The court further said in that case, and it is equally true as to the objection we are considering here: "Indisputably, the determination as to whether or not a concrete foundation would be necessary must be vested in some one. Indisputably, also, the proper person to determine this was not the contractor, but the street superintendent or city engineer."

As stated, and as is plainly obvious, the question whether the earth upon and in which the foundation for the gutters, curbs and round corners was to be laid was naturally of sufficient compactness and strength to be suitable for that purpose was not one which could, upon a mere inspection of the surface, be determined, and was not, therefore, subject to predetermination by the city council.

There is a wide distinction between the case here and the case of *Bolton v. Gilleran*, 105 Cal. 250, [45 Am. St. Rep. 33, 38 Pac. 881]. In the latter case the contract expressly vested in the street superintendent the power of authorizing, for the construction of a "five-foot brick sewer," payment at the rate of either \$9.83 per lineal foot or \$12.78 per lineal foot, according as that official might determine what the nature of the foundation should be. Readily it is thus to be noticed that the governing board in that case conferred upon the superintendent of streets discretionary power which enabled him to exercise his own volition with regard to the cost of the improvement. Manifestly, the board exceeded its authority when so delegating to the street superintendent such power, and the assessment was, of course, held to be void by reason thereof. In the case here there is absolutely nothing in the specifications which, in express terms, authorizes the street superintendent to either increase or decrease the price for laying the foundation for the curbs, gutters, etc., nor, as we have before stated, is there anything on the face of the contract itself dealing with gutters, curbs, etc., from which it can be said that the preparation of the foundation would cost

more by the use of crushed rock for that purpose than by the use of "selected earth material," or *vice versa*. Whether there would be any material difference between the cost of one and that of the other would largely depend, it seems to us, upon conditions existing with respect to the accessibility of either the one or other of these materials. It is safe to say that it is known, as an abstract proposition within the scope of common knowledge, that crushed rock would be much more expensive than ordinary earth material for use in the preparation of a foundation for curbs, etc. But by the phrase "selected earth material" we understand is meant that that quality of earth must be used which would as well serve the purposes of a foundation as would crushed rock, and the difficulty in the way of a predetermination of the difference in the cost between the two materials, if any, would be the expense, first, incident to discovering and selecting the earth material which would meet the test under that description, then the price to be paid for it, if it had to be purchased, and, furthermore, if the points at which such material was procurable were remotely situated from the point at which it was to be used for the foundation, what would be the expense of transporting it to said last-mentioned point.

In *Lambert v. Marcuse*, 137 Cal. 47, [69 Pac. 620], where the specifications called for the construction of a stone and grouted gutters from rock of either of two classes, as classified by the ordinance authorizing the work, designated as "class A" and "class B," and where the claim was that thus an unwarranted discretion was vested in the street superintendent to use the rock of either class, it is said: "The option was given to the contractor to use either class A or class B rock. The material to be used was macadamizing rock, and the difference between the two classes was not in the material, but in the density, or hardness, of the rock. But whether there was any difference in the cost does not appear, and we cannot say, as a matter of law, that there was any such difference. The difference in the cost may, by reason of the situation of the rock in place, or the cost of quarrying of the two kinds, be practically equalized, so that it would become a matter of indifference to everybody concerned which class was used."

The foregoing language has peculiar application to the portion of the specifications now under review, for, as we have tried to show, if, abstractly, it may be said that crushed rock is more expensive than selected earth material, the use of the latter might, for reasons which we have suggested, and perhaps others which have not occurred to us, be as expensive and therefore cost as much as crushed rock, and thus the difference in the expense of the two materials at least approximately equalized so that there would be no material difference in the cost between the two. At any rate, we cannot say, as a matter of law or as a matter of fact, in the absence of an affirmative showing that there was any material difference between the cost of crushed rock and that of "selected earth material," that any such difference existed or would exist.

The objection that the provision requiring that the street shall be brought to a smooth and even surface by " . . . excavating the places above grade and filling the depressions with *suitable earth material*" is mortally uncertain, is too hypercritical to merit extended notice. The vice of that portion of the specifications, it is said, is in the use of the language we have italicized, and it is contended that thereby the street superintendent is given such unauthorized and dangerous power as to enable him to cause the cost to exceed that provided for by the resolution. A provision that the depressions should be filled with "earth material" would probably have attracted no comment or excited no criticism by appellant, as it would have been sufficient to describe the material to be used with substantial and satisfactory accuracy. Under such a description it certainly could not be said that anything less than *suitable* earth material was intended to be used. We are, therefore, unable to discern how or in what way the provision is made any less certain by the addition of the word "*suitable*."

What we have said with regard to the objection first considered applies with equal pertinency and force to the third and fourth points stated in the order in which we have here presented them. We cannot take judicial notice of the fact, if it be a fact, that there is any difference in the cost of the three several kinds of material out of which the crushed rock for the macadam and the rock used in concrete were to be formed. In fact, it would seem that there could in fact be

no material difference in the cost between cobbles, trap and basalt, except possibly in the fact that the one might be the more readily accessible or procurable than the others in a sufficient quantity to do the work.

In the case of *Lambert v. Cummings*, 2 Cal. App. 643, [84 Pac. 266], cited by appellant, the specifications for macadamizing and guttering certain streets in the town of Berkeley prescribed that the macadam should be formed out of one of three classes of rock, of which two classes only (classes A and B) were described with sufficient clearness and definiteness to convey approximately precise information as to the character of the material to be used in the work. The resolution, however, provided that the rock designated as class C should be such rock as might be approved by the board of trustees upon a sample presented to said board for that purpose. Under such a provision it was within the power of the board to require the macadam to be made out of any kind of rock submitted for its inspection and approval, whether it was rock coming within class A or B, which classes, as seen, were defined and described in the specifications, or an entirely different character of rock from that of either class A or class B. The court in that case well said: "It is at once evident that a contractor bidding for the work must have done so upon the probability of being compelled to use the most expensive rock for macadamizing unless he had been assured in some way by some private arrangement that he might use other or different rock. The board were thus enabled to favor one contractor and discriminate against another. . . . A resolution of intention, followed by a notice of letting a contract to macadamize a certain street with such rock as may be approved by the board of trustees, does not describe the work to be done. The contractor may be required to use marble or soft sandstone or cobbles."

It will be observed that the power vested in the board in the cited case by the language of that provision of the specifications designating "class C" made the descriptions of classes A and B, otherwise clear and definite, equally as indefinite and uncertain as class C itself.

But, as seen, the specifications here specifically describe the rock from which the macadam and the concrete should be made, and do not, as in the case cited, leave to the governing

board the right to finally determine whether either of the kinds of rock described should be used or, disregarding altogether the rock described, that some other and different kind of rock, of which there was no description whatever in the specifications, may be used.

In *Lambert v. Marcuse*, 137 Cal. 47, [69 Pac. 620], where, as seen, the street superintendent was clothed with the power to select, in the construction of gutters, from two classes of rock, the supreme court, affirming the judgment for plaintiff in an action to foreclose the assessment, says: "The contract gave the superintendent no power to change the material, nor did it give him any discretion to require material not provided for in the contract and in the specifications." So it is true here. Some discretion in street or sewer or like work must be left to the street superintendent or officer to whom is committed the superintendence of such work, or else all improvements contemplated by the street law must be at an end, and where it does not appear as a matter of law or of fact, as it does not appear here, that the exercise of such discretion will result in either materially increasing or decreasing the cost of the proposed improvement beyond or below that contemplated by the contract, a judgment invalidating the assessment because of the delegation of such discretion would not only be inequitable and unjust, but unconscionable.

The cases of *Perine Cont. etc. Co. v. Pasadena*, 116 Cal. 6, [47 Pac. 777], *Fay v. Reed*, 128 Cal. 360, [60 Pac. 927], *Bay Rock Co. v. Bell*, 133 Cal. 150, [65 Pac. 299], *McDonnell v. Gillion*, 134 Cal. 332, [66 Pac. 314], and *Williamson v. Joyce*, 137 Cal. 107, [69 Pac. 854], are cited by appellant in support of the alleged invalidity of the assessment because of the objections now under discussion; but an examination of these cases will disclose an obvious distinction, as to the facts, between them and the case at bar. It is unnecessary to give them special attention in this opinion. It is enough to say that in those cases there was vested, by reason of an insufficient and indefinite description of the work to be done, in the officer charged with the immediate direction or superintendence of the work a discretion by the exercise of which the cost of the improvement could have been increased or diminished at his will. As stated, such is not the case here.

The fifth objection challenges the validity of the specifications upon the ground that they fail to definitely fix the point at which "a concrete catch-basin" should be located, the exact point of location of said basin being left to the judgment of the city surveyor. In this connection, appellant points out that the specifications do not provide for the location of the curbs, gutters and gutter drains, and contends that for this reason also the specifications are fatally defective. In support of these objections we are referred to the case of *Grant v. Barber*, 135 Cal. 188, [67 Pac. 127]. There the specifications, which were, as here, made part of the resolution of intention, provided that the contractor "shall put in such culverts as the street superintendent may direct," there being no description of such culverts, either as to size or the material from which they should be constructed. Such discretion or power thus delegated to the street superintendent was out of all reason, and the act of the governing board in delegating it manifestly *ultra vires*, or beyond their authority.

In the case at bar the catch-basin and curbs, gutters and gutter drains are minutely described, both with regard to size and the character of the materials of which they were to be made, and, as to the catch-basin, it is to be said that the power given the street superintendent merely to determine the particular point at which it should be located on the street was perhaps only that power which it was found necessary that he should exercise in order to properly locate it. In any event, it does not appear here (and we do not see how it could be made so to appear) that the location of the basin at any particular point would increase or diminish its cost over or below that which would be involved in its location at some other point. As stated, the size and the material from which it was to be made were specified, and, obviously, its cost readily ascertainable therefrom. As to the claim that the specifications are uncertain in that the line of the curbs, gutters, etc., is not specifically located or pointed out, the reply is that there was no necessity for specifically describing so obvious a proposition. Common knowledge tells us that curbs must be placed at one of the edges of the street, and thus, as the Century Dictionary tells us, they form the inner side of a gutter. As counsel for respondent well suggest in their brief: "The edges of the street being established by official surveys,

it is impossible to understand how any doubt could arise as to the location of the curbs, and the position of the curbs being thus fixed, the plans, as a part of the resolution, fix the position of the gutter and the gutter drains." In other words, the exact location of the curbs, gutters and gutter drains, as contemplated by the specifications here, is as easily ascertainable from said specifications as if the same were specifically described, or as would be the location of the foundation of a building with reference to the superstructure.

The remaining objection to be considered involves that part of the specifications providing for the character of the concrete to be used, and the contention is that the street superintendent is therein given the discretion to decide which of two methods may be adopted for the purpose of mixing the sand and cement to be used in forming the concrete. This contention cannot be sustained. All that the specifications call for in this respect is a certain standard of concrete, and they expressly provide that such must be the standard, whether the mixing is done by hand or by a machine. While, under the terms of the specifications, the contractor was at liberty to mix the sand and cement either by hand or by means of a machine, there is no language to be found therein which authorized the street superintendent to dictate to the contractor the adoption of either method. The evident purpose of this part of the specifications was to secure concrete of a certain approved standard, regardless of the means to which the contractor might deem it the better plan to resort in order to furnish the kind of concrete required.

There is a further objection raised against the assessment based on that provision of the specifications which reads: "In case of a misunderstanding or dispute as to the meaning or intent of any provision of these specifications, the interpretation of the city surveyor shall be final."

While it is the paramount duty of the street superintendent, or the city surveyor, or any officer who may be legally charged with the responsibility of superintending the work, to require the work to be done in accordance with the terms of the contract or the specifications, the street law does not provide nor does it contemplate that such power as is thus sought to be delegated should be exercised by an officer or agent of the city or the property owners, and if it did so

provide, the act to that extent would no doubt be held to be in violation of the constitution. There is a wide distinction between the power of one selected as an arbitrator to pass upon the proposition whether the work has been done according to the specifications and the power sought to be conferred here by which the decision of the city surveyor as to disputes involving the "meaning or intent" of the specifications is made final and conclusive, thus opening the way for adjudications which do not constitute that "due process of law" by which citizens can alone be deprived of life, liberty or property. But we are unable to perceive how the provision could have misled bidders for the work. And, assuming that the city surveyor could, by the exercise of the power, have increased or diminished the cost of the work above or below that indicated by the resolution, there is nothing here to show that any attempt was made upon his part to exercise such power, or that occasion arose calling for its exercise.

Thus we have reviewed all the objections urged against the validity of the assessment involved in this action.

It is our opinion, as already expressly stated, and as must be manifest from the views generally we have expressed herein, that all the objections to the assessment in this case involve technicalities behind which there is little if any substance. It is proper, and indeed necessary, that all the provisions and requirements of laws authorizing the levy of assessments or taxes upon the property of citizens, particularly for special purposes, should be strictly followed, where a strict observance thereof is reasonably practicable; for, unless the rights of property owners are not completely safeguarded in the matter of the levy of such taxes, it may become an easy matter to perpetrate all sorts of fraud against property owners, even to depriving them of their property without lawful right or due process of law. Yet, as the supreme court says in *Chase v. Trout*, 146 Cal. 365, [80 Pac. 81], "however desirable it would be to have the precise details of the work, even to the smallest fraction, fixed in advance of the bids, so that the exact cost to the contractor, as well as the contract price may be known at the time the contract is let, it always has been and always will be impossible to do so." And in *Haughwout v. Hubbard*, 131 Cal. 678, [63 Pac. 1079], similar language is used. It is there said: "To some

extent such details must depend on unanticipated contingencies of the actual construction. The specifications must, therefore, always fail, more or less, in certainty or completeness of detail, and hence the most accurate and detailed specification must leave unprovided for many questions arising in the course of the work as to the kind and amount of work or materials and other details of construction. The giving of discretion to some person as to all these details, the culverts possibly excepted, is inevitable in every such work. If not vested in and exercised by the street superintendent, it will be exercised by the contractor himself. The statute recognizes this condition, and itself provides that the work must be done to the satisfaction of the street superintendent." To the same effect is *Haughwout v. Raymond*, 148 Cal. 312, [83 Pac. 53].

That there may be no misapprehension of our views regarding certain propositions treated in this opinion, we desire to say that we are not to be understood from anything herein said as holding that cases have not arisen or that cases may not arise in which the invalidity of a street or like assessment has appeared or may appear from the very terms of the resolution of intention itself. In other words, we are not holding here that, if the resolution of intention should disclose the delegation to the street superintendent of power which the legislature clearly intended should be exercised alone by the board itself, or which, from its very nature, could be said to clothe the superintendent with discretion to enlarge or diminish the cost of the work at his will, the assessment would not have to be declared invalid, regardless of whether or not there was an affirmative showing of actual injury as the result of the exercise of such power. But where, as here, the power or discretion delegated does not appear upon its face to be material or unauthorized, this court cannot declare, as a matter of law, or in the absence of evidence showing that positive injury has in fact resulted from its exercise, that, with regard to the matters as to which such discretion is delegated, the discretion or power so delegated is material or beyond the contemplation of the law.

No substantial reason appears to us why the judgment should not stand, and the same is, therefore, affirmed.

Burnett, J., and Chipman, P. J., concurred.

[Civ. No. 763. Second Appellate District.—April 7, 1910.]

MOORPARK SCHOOL DISTRICT OF VENTURA COUNTY, etc., et al., Petitioners, v. JAMES E. REYNOLDS, as Superintendent of Schools of Ventura County, et al., Respondents.

PUBLIC SCHOOLS—VALIDITY OF UNION HIGH SCHOOL DISTRICT—MANDAMUS TO COUNTY SUPERINTENDENT—CERTIFICATE OF ELECTION—CALLING ELECTION OF TRUSTEES.—Upon a petition for a writ of mandate to compel the county superintendent of schools to make and file a certificate of the result of an election held on the question of the formation of a union high school district, and to call an election of trustees therefor, the primary and vital question to be determined upon such petition is whether it shows upon its face that such union high school was legally or illegally established; and when it appears to be illegally established, the petitioners have no duty to perform, which is the subject of the writ, and the demurrer to the petition therefore was properly sustained.

Id.—ILLEGAL FORMATION OF DISTRICT—BOUNDARIES ILLEGALLY DESIGNATED—ELECTION CALLED WITHOUT JURISDICTION.—Where one of nine petitioning districts included in the boundaries of the alleged union high school district did not include in the petition therefor the majority of the heads of families therein as then required by law, and another of said districts included in said boundaries belonged to another union high school district, the boundaries of the union high school district were illegally designated, and the county superintendent of schools had no jurisdiction to call an election for its formation with such boundaries; and he cannot be compelled by *mandamus* to file a certificate of the result thereof.

Id.—NO DEFINITE LEGAL DESCRIPTION OF TERRITORY—ALTERNATIVE PETITIONS.—Neither of such two districts being legally capable of uniting in a petition to form a union high school district, those who were lawful petitioners therefor failed to unite in any request for specific and definite legal territory to be included therein, where each of the nine petitioners requested that its own territory should be included either with six other districts or eight other districts. In such case it cannot be said that such requests unite upon any contiguous or compact legal territory, which could be lawfully united in a school district; but, on the contrary, there was a request for an election to unite with territory which could not lawfully enter into the district.

Id.—REQUEST FOR DEFINITE TERRITORY ESSENTIAL—AFFIRMATIVE AND NEGATIVE BALLOTS.—The necessity for the definite character of the

requests for the formation of a lawful school district is evident when the statute with reference to the election is considered, which provides that the electors shall vote "Yes" or "No" upon the question involved.

Id.—ALTERNATIVE PROPOSITION IN PETITION AND CALL NOT PERMISSIBLE.

The call for the election must be based upon the petition, and with an alternative proposition in the petition and call for the election, it would not be possible for the electors to express their assent to or dissent from the organization of a lawful district having particular and specified boundaries.

PETITION for writ of mandate to the superintendent of schools of Ventura County.

The facts are stated in the opinion of the court.

T. O. Toland, and Toland & Rogers, for Appellants.

Don G. Bowker, and Edward M. Selby, *amicus curiæ*, for Respondents.

THE COURT.—The petitioners pray the court for a writ commanding the superintendent of schools for Ventura county to make and file a certificate of the result of an election alleged to have been held on August 3, 1909, on the question of forming a certain high school district, and further requiring said superintendent to call an election in said union high school district for the purpose of electing a board of trustees therefor.

Many questions involving a proper construction of the statutes with reference to the creation of high school districts have been presented and ably argued upon this application. We think, however, that the primary question for determination, and the one which should control the action of the court in the premises, depends upon the legal organization and creation of the high school district alleged to have been created by a vote of the people thereof; for if, as a fact, such high school district was not legally created and established, it follows that the superintendent of schools has no duty to perform in connection with the matters sought in the application.

It is made to appear from the petition filed herein that on the thirtieth day of June, 1909, eight certain school districts, to wit: Long Canyon school district, Fair-

view school district, Timber school district, Simi school district, Santa Susana school district, Las Posas school district, Conejo school district, and Moorpark school district, filed with the superintendent of schools of Ventura county eight certain petitions, each of which was in the following form, omitting the introductory part: "We, the undersigned, being a majority in number of the heads of families as shown by the last school census of the _____ school district, and also a majority of the heads of families now residing within said _____ school district, respectfully petition that you call an election in the time and in the manner as by law provided for the purpose of determining the question of establishing and maintaining a union high school district to be composed of the following named school districts, within said county of Ventura, state of California, or of any seven of them, which shall include the _____ school district." Then follows a statement of the names of all the school districts sought to be included, among which was another district called Somis school district. That afterward, on the nineteenth day of July, 1909, Somis school district presented a petition of similar character. All of the nine petitions so presented were similar in form, except that where the blank appears in the petition there was inserted the name of the particular school district joining in the petition. It further appears that the nine school districts comprised contiguous territory, and that excluding Santa Susana school district upon the easterly border and Somis school district upon the westerly border, the remaining seven districts formed contiguous and compact territory. Upon the filing of the petition by the Somis school district the superintendent of schools called an election in each of the school districts, notifying the qualified electors of an election to be held upon the question of the formation of a union high school district to consist of the following school districts (naming the nine districts), or any seven or more of said districts, including _____, which blank contained the name of the particular district in which the notice was posted. That said election was held in each of the school districts named, except that no votes were cast in Las Posas and Conejo districts, and as a result of said election a large majority of the voters in Somis district, Timber district, Moorpark district, Fair-

view district, and Long Canyon district voted for the creation of such high school district, and a majority of all of the voters in the nine districts cast their votes in favor of the formation of such high school district. That the superintendent of schools filed with the county clerk a certificate of the result of said election, which stated that the boundaries of said proposed union high school district are the exterior boundaries of the nine districts in which the election was held. It is further made to appear that, excluding Santa Susana and Somis districts, the census children exceeded two hundred, and the aggregate of votes cast in favor of the formation of the high school district was greater than that of the votes cast against it.

Subdivision 4 of section 1670 of the Political Code (Stats. 1907, p. 958), in force prior to July 1, 1909, provided: "When the heads of families equal in number to a majority in each district, as shown by the last preceding school census, residing in two or more contiguous school districts in the same county (*provided*, that said districts are accredited by said school census with a school population of two hundred or more), shall unite in a petition to the county superintendent of schools for the establishing and maintaining of a union high school district, he shall, within twenty days after receiving said petition, call an election for the determination of the question," etc. It is conceded that a majority of the heads of families in Santa Susana district did not sign the petition. It is also averred in the petition for the writ that Somis school district, included therein, is, and has been at all times for five years, a part and one of the districts comprising and comprised within a union high school district called the Oxnard high school district.

Considering, then, the demurrer filed to the petition for the writ, it is admitted that, by reason of the insufficiency of the petition in behalf of Santa Susana district and the fact that Somis was already within another high school district, neither of said districts could be included within the high school district sought to be created by the petition. The statute authorizing the heads of families to petition is the equivalent of an authority for them to unite in a request for a particular thing. An examination of the petitions filed with the superintendent of schools clearly shows

that the petitioners therefor did not unite in a request for the formation of a specific territory into a high school district. Each district requested that its own territory be included, either with six other districts or eight other districts. The only persons who, under the law, have a right to designate the boundaries of a district are the heads of families. There is nothing in the act indicating that the superintendent of schools, or any other person, shall have any right to determine what districts shall be united, and when the heads of families by their petition fail to unite in a specific request for the creation of a definite territory into a high school district, they fail to comply with the statute, through which petition jurisdiction is given to the superintendent of schools to call the election. Under the peculiar language of these petitions they were open to the construction of requesting the formation of a district which might or might not comprise contiguous and compact territory. These petitions did not unite in a request for an election within the seven districts which could have been united, but, on the contrary, requested an election to unite other territory, notably Santa Susana district, which declined to enter into the district, and Somis district, which could not enter into a new district. The necessity for the definite character of the request is evident when we consider the statute with reference to the election, which provides that the electors shall vote "yes" or "no" upon the question involved. The call for the election must be based upon the petition, and with an alternative proposition in the petition and call for election it would not be possible for an elector by simply answering "yes" or "no" to express his assent or dissent to or against the organization of a district having particular and specified boundaries. We are of opinion, therefore, that the demurrer to the petition for this writ should be sustained.

It may not be improper to say further that were a consideration to be had of the issues presented by the answer and return, nothing is therein disclosed which, in our opinion, could have the effect of validating the proceedings sought to be instituted, or to confer upon the superintendent of schools jurisdiction or authority to call the election.

Writ denied.

[Crim. No. 108. Third Appellate District.—April 7, 1910.]

THE PEOPLE, Respondent, v. D. M. BOND, Appellant.

CRIMINAL LAW—MURDER—SUPPORT OF VERDICT FOR MANSLAUGHTER.—

Upon trial of a charge of murder, where the wife of the deceased, corroborated by her daughters, testified for the prosecution that defendant deliberately fired the fatal shot, without necessity, though her testimony was inconsistent in some particulars, and the evidence for defendant showed that defendant and a codefendant were deputy fish and game commissioners who had arrested the deceased for unlawful fishing, who endeavored to reach for his gun under his wagon, and was commanded by the codefendant with a drawn pistol to stop, whereupon deceased seized hold of such pistol, and tried to wrest it from the codefendant's hand, and in the struggle the codefendant shot him twice with the pistol, and the defendant fired another shot, which hit the deceased, and shortly afterward he died, a verdict against the defendant for manslaughter was sufficiently supported.

Id.—PROVINCE OF JURY—CREDIBILITY OF WITNESSES—WEIGHT OF EVIDENCE—REVIEW UPON APPEAL LIMITED TO INHERENT IMPROBABILITY.—The jurors in such case are the exclusive judges of the credibility of the witnesses and of the weight of the evidence, and appellate courts are bound by the verdict, unless it appears that the testimony in support of the verdict is so inherently improbable as to demand its rejection. *Held*, that it cannot be said that the wife of the deceased, as a witness, was not honestly mistaken in reciting some of the less important details of the occurrence, or that her story was not substantially correct as to the vital points surrounding the homicide.

Id.—FIRING OF FATAL SHOT—QUESTION FOR JURY.—It was a question for the jury who fired the fatal shot; and if there is any evidence in the record from which a rational inference might be drawn that defendant fired the fatal shot, the verdict is conclusive on that question. *Held*, that it cannot be said in view of the evidence in the record that the verdict against defendant on that question was unwarranted.

Id.—THEORY OF AIDING AND ABETTING CRIME.—Upon the possible theory that the codefendant fired the first shot, which caused a flesh wound, that defendant fired the second shot which contributed to the fatal result by wounding defendant and making him loosen his hold, and that the codefendant fired the fatal shot, the defendant was properly found guilty as having aided and abetted the crime.

Id.—COMMUNICATION OF PURPOSE OF CODEFENDANT TO DEFENDANT NOT REQUIRED.—It was not necessary that the codefendant should have

communicated to the defendant his purpose to fire the fatal shot to make the defendant chargeable as a principal. If, with the knowledge of the defendant, the codefendant feloniously made the assault, and the defendant voluntarily assisted in taking the life of the deceased, although he did not fire the fatal shot, both would be equally guilty, and the defendant would be an aider and abettor of the crime committed.

ID.—ABSENCE OF CONSPIRACY — AIDING OR ENCOURAGING CRIME.—Although there was no conspiracy to commit an offense, still if one person commits an offense, and the accused was present and knew the intention of the other, and aids by acts or encourages by words or gestures the person engaged in the commission of the offense, he would be guilty of the offense committed.

ID.—RATIONAL CONCLUSION OF GUILT FROM EVIDENCE—SUFFICIENCY OF EVIDENCE TO CONVICT.—Since a rational conclusion may be drawn from the evidence either that the defendant fired the fatal shot, or wrongfully contributed to the death of the deceased, or that the codefendant wrongfully made a felonious attempt to kill the deceased, and that defendant, with knowledge of such assault, aided in the consummation of the unlawful purpose and therefore became an aider and abettor of the crime, his contention as to the insufficiency of the evidence to convict him cannot be upheld.

ID.—INSTRUCTIONS—ABSENCE OF PREJUDICIAL ERROR.—It is held that there was no prejudicial error in the giving or refusing of instructions; that all the elements of every degree of crime involved in the offense charged were fully defined; that nothing was omitted necessary for the information of the jury; that there was no conflict in the instructions when construed together; and that the theory of the defense, as formulated for the defendant appealing, was fully presented to the jury in the instructions.

ID.—JUSTIFIABLE HOMICIDE BY ARRESTING OFFICER—CONSISTENT INSTRUCTIONS—CONSTRUCTION WITH CHARGE.—It is held that instructions as to the law of justifiable homicide by an arresting officer were not inconsistent, when they were to the effect that if the officer is authorized to make the arrest, he may use whatever force is necessary to accomplish his purpose and overcome whatever resistance may be offered, and that if the resistance was of such a nature that it appeared to the officer as a reasonable man that he or anyone acting with or under him was in danger of receiving great bodily harm, he would be justified in killing the prisoner; but that this right appearing to him as a reasonable man to overcome all resistance, even to the taking of life, cannot be used as a subterfuge to take life without necessity; and that any ambiguity therein is fully cured by the remaining charge of the court, completely expressing all the conditions to which the evidence relates and under which the right to take the life of the deceased existed.

ID.—EVIDENCE—REMNANTS OF SHIRT WORN BY DECEASED.—The court did not err in admitting in evidence the remnants of the shirt worn by deceased at the time of the homicide, which had been in the custody of the sheriff from the time when it was removed from the body. If appellant relied upon the absence of a proper foundation for its admission, he should have called the attention of the court thereto, or have questioned the witness concerning it.

ID.—TESTIMONY OF SHERIFF TO DIRECTION OF FATAL BULLET.—The court properly allowed the testimony of the sheriff, who had inspected the body after the homicide, and was competent to describe what he saw, that a bullet had entered the left side of the deceased, and passed through his body and came out on the right side; and where that fact appears without conflict, the testimony, in view of the conceded facts, was favorable to the appellant.

ID.—OPINION EVIDENCE—AGE OF DECEASED.—The court properly allowed a witness long familiar with the deceased to give his opinion as to his age. The rule seems to be that age is provable by the inference of any competent observing witness.

ID.—OFFERED EVIDENCE TO SHOW NONWORKABLE CONDITION OF FISHING LADDER — INFERENCE OBLIATED BY INSTRUCTION.—Any inference from offered evidence to show the nonworkable condition of a fishing ladder within the prohibited distance from which defendant was fishing that it would not be a misdemeanor to fish there is obviated by an instruction that "the fish commissioners placed deceased under arrest for the violation of the game and fish laws of California committed in their presence."

ID.—EVIDENCE OF TREATMENT OF ANOTHER PERSON ARRESTED.—The court properly excluded offered evidence to show the manner in which the game and fish commissioners had treated another person previously arrested for violating the fish law, as not being pertinent to disprove the commission of the crime for which the defendant was being tried.

ID.—CROSS-EXAMINATION OF CODEFENDANT — ABSENCE OF PREJUDICIAL ERROR.—It is held that no prejudicial error appears upon the cross-examination of the codefendant as to his evidence upon the preliminary examination; that preliminary questions were properly allowed without producing the transcript, and that further answers were so satisfactory that no prejudice could possibly have resulted to the defendant; and that there was no prejudicial error upon any subject matter of his cross-examination.

APPEAL from a judgment of the Superior Court of Tehama County, and from an order denying a new trial. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

Jas. T. Matlock, Jr., Braynard & Kimball, and W. H. Orrick, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

BURNETT, J.—The defendant and one M. A. Carpenter were jointly charged with murder. They were tried separately and the defendant Bond was convicted of manslaughter. He has appealed from the judgment and the order denying his motion for a new trial.

On August 20, 1908, appellant and the said Carpenter, who were deputy fish and game commissioners, were at a certain point on Battle creek, in Tehama county, looking for an individual who, they had been informed, was violating the fish and game law. They walked up the creek and observed the deceased, an Indian named Robert Junior, engaged in unlawful fishing. The officers went away in search of the other party, but returned in a short while and placed the Indian under arrest. With Junior at the time were his wife, his daughter and his granddaughter. There is a sharp conflict in the testimony as to what occurred at the scene of the arrest, but it is agreed that all the parties proceeded up the hill to the camp of the deceased. An entirely different account from the statement of the defendants as to what occurred at the camp is given by the Indians. According to the former, the history of the affair is about as follows: Upon their arrival the deceased looked around and about the wagon as though searching for something, the Indian woman taking her position at the rear wheel thereof, the evidence without conflict showing that while Junior was down at the creek fishing the Indian girls had placed his rifle under the wagon and covered it with a quilt. Deceased then went out to a tree and an outhouse, which were near, and immediately turned back, looked under a board and then started toward the wagon. Bond and Carpenter were watching him and the latter stated to the former: "I guess he hasn't got any gun." They then started toward their buggy, Bond being in advance about fifteen feet. When they had gone about twenty feet they heard a commotion at the rear end of the wagon and looking back they saw the Indian woman show-

ing deceased away and saying to him, "Oh, no; oh, no; go away." The deceased was crouching down to get under his wagon. Carpenter, who was carrying a fish basket containing fish which he had taken from deceased, threw it down and hastily returned to the wagon where Junior was endeavoring to get the gun which had been partially exposed. When Carpenter was within four or five feet of him the Indian ran around the right hind wheel of the wagon and got hold of the gun barrel and Carpenter leveled his revolver at deceased and said to him: "Get away from there; let that gun alone; you are crazy." Deceased then straightened up and suddenly grabbed Carpenter's pistol with his left hand, catching hold of Carpenter's arm and coat sleeve with his right hand. They then struggled for the possession of the revolver out toward a certain tree. During the time Carpenter fired a shot and when they reached the tree he fired again and deceased fell away from him to the ground. When Carpenter drew his pistol the defendant Bond was about twenty feet away and he hastily returned to the wagon, but did not arrive until after Carpenter had fired the first shot. Two other shots were fired about the same time, one by Carpenter and the other by Bond. At this time Carpenter was trying to lunge away from the Indian and they were still struggling together. Bond testified that he fired the shot "to make him (Junior) let loose of Carpenter. He was struggling with Carpenter for the possession of the gun at that time." One bullet shattered the left shoulder of the deceased and another passed through his body, entering from the side just above the nipple, the point of exit being three or four inches lower, causing his death a few seconds thereafter.

It is stoutly insisted by appellant that the evidence is insufficient to support the verdict of manslaughter. It is virtually conceded that there is testimony tending to show that the crime was committed, but the contention is that it must be disregarded on account of the want of credibility of the witnesses so testifying. In this connection we deem it necessary to refer only to the widow, who was the principal witness for the people. It is contended that it appears she contradicted herself in important particulars, when we compare her testimony at the coroner's inquest, the preliminary

examination and the trial of the defendant. On two essential propositions, it is contended by appellant, she is entirely inconsistent, to wit: "As to whether deceased straightened up and turned around before stepping away from the wagon, or straightened up and stepped backwards from the wagon, also as to whether the point of entrance of Bond's bullet was on the left or right side of deceased, she having at the time of the trial changed her testimony in both of these particulars from that given by her at both the coroner's inquest and the preliminary examination. In addition to this she has made the very startling and unnatural statement that defendant Bond, a deputy fish and game commissioner, deliberately and in cold blood fired the shot without saying a word or a moment's warning, and without any hostile demonstration on the part of deceased." But how can we say that the witness was not honestly mistaken in reciting some of the less important details of the occurrence and that her story was not substantially correct as to the vital facts surrounding the homicide? Is it not a matter of common knowledge that honest and intelligent witnesses differ radically in their statements of even less exciting events which they have witnessed and that they are often strangely uncertain as to details which seemingly would make a lasting impression upon the memory? We should not demand of this untutored Indian woman a more tenacious memory, a clearer impression of the surrounding circumstances attending an event of such excitement and trepidation or a more consistent statement of its various features than experience and observation demonstrate may be expected from more intelligent and favored observers of such an occurrence. And while it does seem somewhat incredible that a public officer should be guilty of such brutality as is described by this witness, it must be admitted that the annals of crime contain the record of many deeds equally cruel and inexplicable. But the complete answer to the whole contention of appellant readily suggesting itself is that the jurors are the exclusive judges of the credibility of the witnesses and of the weight of the evidence, and unless the testimony in favor of the verdict is so inherently improbable as to demand its rejection appellate courts are bound by it. It is needless to add that it is not a question of whether the higher court is convinced by it of de-

fendant's guilt or may be satisfied of defendant's innocence. The Indian woman did testify clearly and positively to facts from which only the inference can be drawn that the defendant committed at least the crime of manslaughter, unless it can be said that there is no sufficient evidence that defendant's shot caused the death of deceased. Indeed, giving full credit to her statements, and assuming that there was a sufficient showing that appellant's shot contributed to the fatal result, the conclusion would follow that there should have been a conviction of murder. But it is probable that, recognizing the not uncommon disposition of mankind to yield somewhat to the influence of interest or prejudice in giving testimony of important events of deep concern to the witness, the jury believed that all the witnesses to the homicide were not entirely candid, and while rejecting the theory that defendant maliciously killed the deceased, they were satisfied that he was not altogether blameless and should be convicted of the lesser offense.

At any rate, here is some of the testimony which we are asked to brush aside as unworthy of credence: "My husband he pass around the wagon and went over here where this table was and looked in the box and then come back along here and I caught him by the arm and called his attention to this loose wagon nut. He was standing near this loose wagon nut when I had this conversation with him about the monkey wrench, and Carpenter was over there with his fish basket and Bond was standing over here near the right hind wheel of the wagon. The time that I saw Bond shoot my husband was when my husband turned around and was facing over towards the oak tree, then my husband staggered back to the live oak tree and was holding on to one of those cross-bars, and he was there when Carpenter shot him. My husband didn't reach around to pick up the gun and didn't offer to fight Bond, and didn't tell Bond that he would fight him, and didn't tell him that he would cut him or shoot him. He didn't have a club in his hand. He didn't have any rock to go and strike Mr. Bond. He didn't have any knife at all. He didn't offer to fight Mr. Bond at any time. I was right there all the time."

The testimony of the girls as to what occurred at the camp in the main corroborates the statements of the widow.

Another circumstance to which attention is directed by appellant to show the improbability of the testimony of the Indian witnesses relates to the entry and exit of the bullet. It is argued that since the ground was comparatively level and Junior was admittedly much taller than the defendant, if the shot had been fired as related by said witness the bullet would have left the body above the point of its entry. But this is a matter of speculation, and it overlooks the familiar fact that the course of such wounds through the tissues of the body is often eccentric and apparently opposed to the recognized laws of physics. Besides, there was evidence from which the jury had a right to infer that the position of defendant, as testified to by the Indian witness, was considerably higher than the place upon which Junior was standing.

But it is further insisted by appellant: 1. That "the evidence is insufficient to show that defendant fired the shot which caused the decedent's death"; and 2. It "totally fails to show that any conspiracy was entered into between Carpenter and defendant, or that the latter aided and abetted the former in the commission of the homicide."

As to the first proposition it is said: "Of the three shots fired, Carpenter fired two and defendant one. One of the three missed the decedent, another inflicted a flesh wound merely, while the third passed through the most vital parts of the body, causing instantaneous death." It is claimed that there is no evidence to show that the defendant fired this shot which passed through the body. In arguing the importance of this feature of the case appellant says: "Even had the authorship of the fatal shot been merely one of a series of incidental or secondary facts necessary to establish the defendant's connection with the affair, instead of being, as it was, the paramount issue in the case, it is certain that it would have had to be proved to a moral certainty, and in such a manner as to exclude every other reasonable hypothesis." (*People v. Phipps*, 39 Cal. 333.) But answering the last suggestion first, it should be sufficient to say that the rule announced is for the jury and not for a reviewing court. If we can find any evidence in the record from which a rational inference might be drawn that defendant fired the fatal shot, our inquiry as to this feature can go no further. It is, of course,

well settled that "If the evidence which bears against the defendant, considered by itself and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive." (*People v. Emerson*, 130 Cal. 562, [62 Pac. 1069].) There is this to be said, also, that it is a mere inference drawn by appellant from the evidence that one shot "inflicted a flesh wound merely," while another caused "instantaneous death." One of the witnesses testified that the shot which inflicted what appellant calls "a flesh wound merely" "broke the arm completely, but we couldn't find out if it had left the body at all, and I don't know whether that bullet that entered the arm went down into the heart or not." Another witness who declared on direct examination that one of the shots "pierced his arm about the center of the arm up near the shoulder, breaking his arm and lodged in the bone," said on cross-examination: "I didn't see whether that bullet went out or not. There was no indication of it. It might have gone down and lodged in the deceased's arm. I couldn't tell whether it stopped in a bone or went on into the body." No autopsy was held, and there is probably nothing in the respective positions of the participants at the time of the homicide or in the course of the bullets to afford any assistance in determining who fired the fatal shot. There is—it may be admitted—no certainty as to its source, and it cannot be positively affirmed which shot missed the deceased, which of the two, if only one, or whether both striking the body caused the fatal termination, or how long the deceased survived the fatal blow; but the question with which we are concerned is, do we find in any of the circumstances detailed by any of the witnesses substantial support for the inference that appellant fired the fatal shot?

According to the transcript, the widow testified "D. M. Bond shot my husband. Shot him right here. (Showing.) My husband he hold him right here this way (showing), and he go back that way; and he hold this pole here and he come across and he hold him here, and he do this way (illustrating by holding hands on body), 'Oh!' And he do that way. (Showing.)" It thus appears that the witness illustrated

the actions of Junior after the first shot was fired by appellant. While, manifestly, we have an incomplete reproduction of those movements, there is sufficient in the transcript to support the inference that the Indian was seriously wounded. The convulsive movements of the body and the position in which the hands were placed, apparently described by the witness, may have carried to the jury the conviction that the shot fired by Bond was the one that passed through the body and caused the death of the deceased. We cannot say, in view of the record, that such conclusion is unwarranted. According to the witness, the question of the infliction of the fatal wound narrows itself to two shots—one fired by appellant and the other by Carpenter—since she declares that the last shot was fired into the air when she struck Carpenter's pistol while her husband was lying on the ground. It is quite probable that both of these shots which took effect contributed to the death of Junior, but, at any rate, the solution of the question as to who caused his death must be found in the circumstances detailed by the witnesses, and it cannot be said that the inference which connects appellant with the fatal result is unsupported.

But again, it will not be disputed that the jury had a legal right to reject a portion of the testimony of the defendants and also of the witnesses for the prosecution. The jury, basing their conclusions upon the evidence, may have adopted substantially the following theory: That the Indian assaulted Carpenter at the creek, as testified to by the latter; that defendants harbored resentment in consequence of Junior's violent conduct; that, after arriving at the camp, Carpenter, without even the appearance of justification, drew his pistol and made an effort to shoot the deceased; that the latter seized the pistol and while the two were struggling for its possession Bond, understanding the situation, deliberately fired a shot which contributed to the fatal result and caused the Indian to relax his hold upon the weapon and thereupon Carpenter fired the last shot, which was followed immediately by the death of Junior. Upon this theory it could not be doubted for a moment that appellant could be convicted properly as an aider and abettor of the crime. "The word 'aid' does not imply guilty knowledge or felonious intent, whereas the definition of the word 'abet' includes knowl-

edge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime." (*People v. Dole*, 122 Cal. 492, [68 Am. St. Rep. 50, 55 Pac. 581].) Or, as defined in *State v. Tally*, 102 Ala. 25, [15 South. 722, 737], cited by appellant: "The legal definition of 'aid' is not different from its meaning in common parlance. It means to assist; 'to supplement the efforts of another.' (Rapalje and Lawrence's Law Dictionary, p. 43.) 'Abet' is a French word compounded of the two words 'a' and 'beter'—to bait or excite an animal; and Rapalje and Lawrence thus define it: 'To abet is to incite or encourage a person to commit a crime.' An abettor is a person who, being present or in the neighborhood, incites another to commit a crime and thus becomes a principal in the offense." It would not be necessary for Carpenter to have communicated his purpose to appellant to make the latter chargeable as a principal. If, with the knowledge of Bond, Carpenter feloniously made the assault and the former voluntarily assisted in taking the life of the Indian, although he did not fire the fatal shot, both would be equally guilty. It would be absurd to say that if Bond knowingly contributed to the death of Junior he would not be an aider and abettor of whatever crime was committed. There is nothing opposed to this view in the decisions cited by appellant. For instance, in *Walker v. State*, 29 Tex. App. 621, [16 S. W. 548], the court of appeals of Texas said: "But again, in order to hold the defendant a principal where he did not participate in the actual infliction of the fatal wound, it is absolutely necessary for the state to show that he knew of Shearer's intent to commit the murder or fire the fatal shot, and that knowing this intent on the part of Shearer he aided it or encouraged him by acts or words to do so." Or, as it is stated in *Lyons v. State*, 30 Tex. App. 642, [18 S. W. 416]: "If there be no conspiracy or agreement, each would be held responsible for his own acts. But, though there was no conspiracy to commit an offense, still if one commits an offense, and the accused was present and knew the intention of the other and aids by acts or encourages by words or gestures the person engaged in the commission of the offense, he would be guilty of the offense committed. But he would be guilty only to the extent of his knowledge or

for the natural and reasonable consequences of the acts aided or encouraged by him.”

There can be no controversy about the doctrine announced in *Wilson v. State* (Tex. Cr.), 24 S. W. 409, and other similar cases cited by appellant, that “If two or more persons conceive the intention at the same time to strike B. without previous concert, and do strike him without knowing the intention of the other, each would be responsible for his own acts, but would not be an aider or abettor of the other. To apply this rule to this case, if appellant, without concert with Sam, and without knowledge of his intentions, conceived the intention to and did strike Bagley with a rock about the time that Sam stabbed him, he would not be responsible for said act; nor would he, in striking Bagley, be aiding or abetting Sam in his acts. But, notwithstanding this, if appellant assaulted deceased with the rock he would be responsible for the homicide; or, if the blow with the rock contributed materially to the death of Bagley, he would also be responsible.”

Appellant’s contention as to the insufficiency of the evidence cannot be upheld, therefore, for the reason that a rational conclusion may be drawn therefrom—either that he unjustifiedly fired the fatal shot, or wrongfully contributed to the death of the deceased, or that Carpenter made a felonious attempt to take the Indian’s life, and appellant, with knowledge of such assault, aided in the consummation of the unlawful purpose and therefore became an aider and abettor of the crime.

Appellant complains because the court refused to charge the jury “That if no aiding and abetting by the defendant in the homicide, and no conspiracy between him and Carpenter had been shown, and if there existed a reasonable doubt as to which of them inflicted the wound from which the deceased died, the defendant was entitled to be acquitted.” Nothing, however, seems to have been omitted that was necessary for the complete information of the jury. All the material elements of every degree of crime included in the charge were clearly defined and the jury were instructed that “Unless you believe from the evidence to a moral certainty and beyond a reasonable doubt that Robert Junior was killed by the defendant D. M. Bond and by no other person;

or that he was killed by said defendant and another person who had conspired together to commit the crime, or that he was killed by some other person while said defendant aided and abetted such other person in killing him, it will be your duty to acquit the defendant." The foregoing was given at the request of the defendant and embodied a recognition of the three aspects of guilty participation as a principal in the commission of a crime which are described in section 31 of the Penal Code, as where one "directly commits the act constituting the offense, aids and abets its commission, or not being present has advised and encouraged its commission." There is no evidence in the record that prior to the killing the defendants "had conspired together to commit the offense," and therefore that portion of the instruction might well have been omitted, but appellant cannot complain, because he requested it, and, besides, it is clear that it could not have prejudiced the jury. It may be said, also, that it was not error for the court to refuse the instruction that "If there is not a conspiracy proven then the defendant did not aid and abet, and if you do not believe beyond a reasonable doubt that Bond's shot killed Robert Junior then I instruct you that the defendant Bond is entitled to a verdict of acquittal." "Conspiracy" implies an agreement to commit the crime, while to "aid and abet" requires actual participation in the act constituting the offense. It is therefore manifest that one may "aid and abet" without having previously entered into a conspiracy to commit the crime.

The court declined to give to the jury the definition of conspiracy. There seems to have been no necessity for such is the one to which we have already referred, and we must definition. The only instruction in which the term appears assume that the average juror would know what the court meant by the expression "had conspired together to commit crime." It is not open to the imputation, as claimed by appellant, "that the fact that the defendant and Carpenter had formed a joint or common purpose of arresting law breakers and of enforcing in a lawful manner the law passed for the protection of fish would have made them conspirators and liable for the acts of each other while in the execution of that purpose." The instruction, by necessary implication, excludes from consideration any agreement except one

to commit "the crime." The "crime" referred to is clearly the felonious killing of the deceased. It is claimed that appellant was entitled to an *affirmative* charge upon the subject covered by said instruction, and *Phipps v. State*, 34 Tex. Cr. 608, [31 S. W. 657], is cited, wherein it is stated: "The charge of the court instructs the jury who are principals, and throughout, on behalf of the state, in instructing the jury as to each grade of the offense, the jury are told, if you believe that M. V. Phipps either alone or acting with Tom Phipps as charged in the indictment did certain acts, then he would be guilty of the offense, etc. *But nowhere in the charge* are the jury instructed affirmatively if Tom Phipps killed the deceased and the defendant did not act or utter no word in aid or encouragement of said Tom Phipps, then he would not be guilty of any offense. Inasmuch as the evidence in this case, as before stated, fails to show that M. V. Phipps did any act in aid of said homicide, at the time, such a charge was pertinent and was called for, and should have been given by the court in an affirmative and substantive manner." But here the jury were told unequivocally that they must believe beyond a reasonable doubt that one of these several conditions existed or else they must acquit. It is difficult to understand how the instruction could have more positively "affirmed" the duty of the people to establish one of these conditions to justify conviction.

It is further claimed that the instructions upon the question what would constitute justifiable homicide when committed by an officer in making an arrest were confusing and conflicting. The instructions complained of were: "A peace officer may arrest anyone committing a misdemeanor in his presence, without a warrant. In the making of the arrest, or in preventing an escape after the arrest, the officer, when resisted by the offender, is not bound to retreat; but may use such physical force as is apparently necessary on the one hand to effect the arrest by overcoming the resistance he encounters, or on the other to subdue the efforts of the prisoner to escape, but he cannot in either case take the life of the prisoner, unless it appears to him as a reasonable man, from all the circumstances, that the taking of the life of the prisoner is necessary to prevent the infliction of great bodily injury upon himself or upon those acting with or under him,

or to prevent the killing of himself or those acting with or under him," and again: "The defendant, as an officer of the law, had a right, in endeavoring to arrest and retain the said Robert Junior, if said Robert Junior had committed a public offense in his presence, to use all the force that was necessary, or that appeared to him as a reasonable man to be necessary, to overcome all resistance, *even to the taking of life*, and if he use no more force than was reasonably necessary, or that appeared to him as a reasonable man to be necessary, to then and there overcome any resistance that was being made to him, he should be acquitted," etc.

The contention is that these instructions are irreconcilably conflicting inasmuch as in the former the jury were told that "the defendant was not justified in killing the decedent merely because this was necessary in order to arrest him," and in the latter that "if the decedent had committed a public offense in the defendant's presence, the latter had a right 'to use all the force that was necessary or appeared to him as a reasonable man to be necessary to overcome all resistance, *even to the taking of life.*' "

The distinction made by appellant is, we think, more fanciful, than real. We must, of course, read the whole of the instructions together and so considered there is no conflict whatever. The proposition of law expressed in both of these instructions is that where the officer is authorized to make an arrest he may use whatever force is necessary to accomplish his purpose and overcome whatever resistance may be offered. Unless the resistance, however, should be of such a nature that it appeared to the officer as a reasonable man that he, or anyone acting with or under him, was in danger of receiving great bodily injury, he would not be justified in killing the prisoner. The reason is plain; in such case he could overcome the resistance without killing the prisoner. A resistance that does not threaten great bodily injury can and should be overcome without a homicide. Therefore he may use all the force "that appears to him as a reasonable man to be necessary to overcome all resistance, *even to the taking of life,*" as stated in the second quoted instruction, but this claim of resistance is not to be a mere subterfuge; the resistance must be such as appears to the officer likely to inflict great bodily injury upon himself or those acting

with him. Otherwise there is no necessity to take life and it cannot be permitted.

But if there was any inconsistency or confusion in the quotations already made, it is entirely removed by the concluding portion of the second instruction, which we deem it unnecessary to set out in full. Even if we were to concede that the court used an inaccurate or incomplete expression in the foregoing we would still be required to hold that it was without prejudice, as when all the charge is considered we find that all the conditions concerning which the evidence relates and under which the right to take the life of deceased existed were fully and completely expressed. (*People v. Turpin*, 10 Cal. App. 526, [102 Pac. 680].) The theory of the defense, as formulated by counsel for appellant, was fully presented to the jury in the instructions, and we see nothing to criticise therein.

The court did not err in admitting in evidence the remnants of the shirt worn by deceased at the time of the homicide. It had been in possession of the sheriff from the time it was removed from the body, and the only objection made was that the proper foundation had not been laid. If appellant was relying upon the claim that it was not shown to be in the same condition as at the time it was removed, he should have called that to the attention of the court or interrogated the witness concerning it. It was probably an unnecessary piece of evidence. There is nothing in the record to show that there was anything in the appearance of the cloth to throw any particular light upon the tragedy, but it is clear as anything can be that we cannot say that the introduction of the fragment of the shirt influenced the jury against appellant. As far as we are advised, the effect could have been no different if a portion of any other garment worn by the deceased had been received in evidence. The case is not at all similar to the one cited from Mississippi, where the skull of the deceased was produced without sufficient preliminary proof.

Appellant assigns error in the ruling of the court "allowing Sheriff Boyd to testify that the bullet entered the left side of deceased, passed through his body and came out on the right side." The objection was that the "proper foundation had not been laid and the witness was not properly

qualified." The witness had inspected the body and was competent to describe what he had seen. If it should be said that the position of the place of entry and of exit involved expert knowledge, or that it was not a proper subject of expert testimony, the complete answer is that the other evidence shows without conflict that the bullet entered the left side, and this is the theory upon which appellant assails vigorously the testimony of the Indian woman. That the deceased was shot to death appears without controversy, and the answer to the said question, in view of the conceded facts, is favorable to appellant.

One Bramlett, a witness for the prosecution, was permitted to give his opinion that deceased was seventy years of age. The rule seems to be that "Age is provable by the inference of any competent observing witness. This is true both in the case of human beings, whether they be adults, minors or children, and in the case of animals or inanimate objects." (17 Cyc. 98.) The witness showed he was qualified by testifying that he had known the deceased for something like twenty-five years. The jury, though, probably attached no importance to his testimony, as it was very much weakened on cross-examination, and the widow testified that her husband was strong enough to whip either of the defendants.

The court overruled the objection to the question asked in the cross-examination of the witness Pedlar: "Do you know whether that fish ladder was in working order at the time you were there?" The contention of appellant is that "This cross-examination and the introduction of evidence as to the condition of the fish ladder must have prejudiced the defendant's case to the extent of leading the jury to believe that fishing within the prohibited distance of a fish ladder which was not in working order would not be a misdemeanor." But, as pointed out by the attorney general, this inference was obviated by the instruction of the court that the defendants were deputy fish commissioners, and while acting in such capacity "they placed deceased under arrest for the violation of the game and fish laws of California committed in their presence."

One Anderson had been arrested by defendants on August 19th for violating the fish law, and by him appellant sought to show that he had been properly treated by the officers.

The court rightly sustained an objection to the proffered testimony. So far as we are informed, the conduct of defendant upon a different occasion has never been held pertinent evidence to disprove the commission of a crime of which he is being tried. If appellant desired to have the jury apprised as to his character or reputation in the community for the trait involved in the charge, the statute provides how that should be done. It is needless to say that the said attempt did not meet the requirement of the law.

Appellant complains because the court, without requiring the record to be shown the witness, permitted the cross-examination of the codefendant Carpenter as to his failure to testify at the coroner's inquest and the preliminary examination concerning certain matters related at the trial. The questions were: "I will ask you, Mr. Carpenter, if at the coroner's inquest, when you were detailing this affair before the inquest, if you testified to anything before the jury about hearing voices upon the bank?" and "Now, I will ask you if at the coroner's inquest you testified to anything about the peddler fishing there?" and "Now, I will ask you if both at the preliminary examination of this case and at the former trial of this case, if you didn't place my hand upon this gun and testify that that was the manner in which the Indian grabbed it?"

As to the first two, they were merely preliminary for the purpose of impeachment and were properly allowed, although the transcript of the testimony of the witness was not first shown him. (*People v. Hart*, 153 Cal. 261, [94 Pac. 1042].) It is also clear that the matter is of so little importance and the answers were so satisfactory that no prejudice could possibly have resulted. It is not contended that the incident referred to in the last question was photographed, and we must assume that the record would have afforded no assistance. As to this, it may be said also that no unfavorable inference could have been drawn from the explanation of the witness.

Witness Carpenter was cross-examined as to whether he put his hand upon the shoulder of deceased when arresting him, and also whether the fish ladder was in working order. Appellant contends that this may have created in the minds of the jury an erroneous impression that the arrest of de-

ceased was unlawful. But, as we have seen, this was obviated by the instruction given in reference to the arrest.

The objection that they were not proper cross-examination to the questions asked of the defendant as to an agreement to see the deceased and his family home, and in reference to the distance from the right hind wheel of the wagon to the tree, was properly overruled. Besides, they related to trivial matters and the answers could not possibly have influenced the result.

The record has received our careful attention to the end that no injustice might be done, but, in our opinion, it cannot be said that the appellant did not have a fair trial or that there is not substantial support for the verdict.

To interfere with the conclusion of the jury and of the trial court would be, as it appears to us, a violation of the well-established principles governing the action of appellate tribunals.

The judgment and the order are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 781. Second Appellate District.—April 9, 1910.]

W. P. JEFFRIES COMPANY, a Corporation, Petitioner,
v. THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY OF LOS
ANGELES, and W. P. JAMES, Judge of Said Superior
Court, Respondents.

WRIT OF REVIEW — JURISDICTION OF SUPERIOR COURT — APPEAL FROM JUSTICE'S COURT — NOTICE OF FILING UNDERTAKING — EFFECT OF CHANGE IN CODE.—The service of the notice of the filing of the undertaking on appeal from the justice's court to the superior court, as provided by section 978a of the Code of Civil Procedure, enacted November 11, 1909, is not necessary to give the superior court jurisdiction of the appeal; and an order refusing to dismiss the appeal for want of such service cannot be annulled upon writ of review.

Id.—STATUTORY CONSTRUCTION—PURPOSE OF CHANGE IN CODE.—Statutory provisions are to be construed with reference to the intention and purpose of the enactment. The apparent evil to be remedied

by the amendment of 1909 was the necessity that the owner of a judgment in the justice's court should watch the justice's docket for thirty days to prevent an appeal without adequate security; and this evil was remedied by the new provision for an undertaking within five days after the notice of appeal, and that notice of its filing be given to him.

RE.—OBJECT OF NOTICE OF FILING UNDERTAKING—PART OF COLLATERAL PROCEEDING FOR JUSTIFYING.—The nature and object of the provision for notice of the filing of the undertaking is not to make it a step in the perfecting of the appeal, but to make it merely a part of the collateral proceeding to justify; its sole use being to bring home to respondent the knowledge that the appeal is already perfected *prima facie*. It merely invites the respondent to inspect the undertaking already filed.

ID.—PENALTY NOT ATTACHED TO FAILURE OF NOTICE.—There is no provision in the statute as to the time within which the notice of the undertaking should be served, nor the effect of a failure to serve it.

ID.—SUBSTANTIAL NOTICE—SERVICE OF NOTICE OF APPEAL—TIME FOR FILING UNDERTAKING FIXED BY LAW.—The filing and service of the notice of appeal is in legal effect a notice that under the law the appellant must file his undertaking within five days thereafter to make his appeal *prima facie* effective. It therefore works no hardship that the technical notice of the filing of the undertaking is not given to the appellant, so as to require him to except to the sureties within five days after filing of the same, which is in fact required of him by law.

ID.—ABSENCE OF CHANGE AS TO TIME FOR EXCEPTING TO SURETIES.—No change was made by the amendment of the code in 1909, as to the time within which the respondent must except to the sufficiency of the sureties on the undertaking on appeal. This is required to be done within five days after the filing of the undertaking, without reference to any notice of its filing. The provision for such exception is independent, and cannot be read into the prior provision.

ID.—JUSTIFICATION OF SURETIES—COLLATERAL PROCEEDING.—The justification of the sureties after exception, or of other sureties in their stead, is not a step in taking an appeal, but is a collateral proceeding in which respondent exercises the right granted to him to obtain adequate security for his protection on the appeal.

ID.—WAIVER OF RIGHT.—The respondent may waive his right to further security; and if he fails to exercise his right to except, or fails to attend before the court, when the sureties are in attendance to justify, his right is waived; and the original qualification of the sureties operates as a full and complete justification, and the appeal remains perfected and effectual under the original undertaking.

PETITION for writ of review to the Superior Court of Los Angeles County. W. P. James, Judge.

The facts are stated in the opinion of the court.

Andrew J. Copp, Jr., for Petitioner.

James P. Clark, and Sidney J. Parsons, for Respondents.

THE COURT.—*Certiorari*. Petitioner is plaintiff in an action brought in a justice's court of Los Angeles county, in which he obtained a judgment against the defendants in the action on October 11, 1909. The latter appealed to the superior court upon questions of both law and fact. Separate notices of appeal were served and filed on October 21, 1909, by two of the several defendants in the action, and on the same day the statutory undertakings on appeal and to stay execution were filed by one of the defendants; and on October 25, 1909, a separate undertaking for the same purpose by the other appealing defendants was filed. On October 27, 1909, all the papers in the cause were certified to and filed in the office of the clerk of the superior court.

No notice of the filing of these undertakings, or either of them, was given as provided by section 978a of the Code of Civil Procedure at the time they were filed, or within thirty days thereafter; and, on November 11, 1909, respondent served notice upon appellants of its intention to move to dismiss the purported appeals, which motion was noticed for November 22, 1909, and based upon the failure of appellants to serve the notices of the filing of said undertakings as aforesaid. An affidavit of counsel setting out the facts was served with the notice. Thereafter, on November 12, 1909, one of the appellants served notice upon petitioner of the filing of his undertaking. The motion to dismiss said appeals was heard at the time for which noticed and the motion denied. It is this order denying this motion which we are asked to review.

Section 978a, Code of Civil Procedure, is a new section added to the code in 1909, and reads as follows: "The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of

the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

The requirement of the first sentence, to wit, the filing of the undertaking within five days after the service of the notice of appeal, and the giving of notice of the filing of the undertaking, are new provisions in the statute. Prior to the enactment of this section the undertaking could be filed at any time within the thirty days during which the appeal might be taken (sec. 978). The portion of 978a relating to the justification of sureties is but a re-enactment of the same matter theretofore a part of section 978.

It is apparent, then, that the only question presented on this application is: "Was service of notice of the filing of an undertaking by appellants necessary to give the superior court jurisdiction of the appeal?" We think this question must be answered in the negative. Statutory provisions are to be construed with reference to the intention and purpose of their enactment. The apparent evil to be remedied by the amendment of 1909 was the necessity under the old conditions that the owner of a judgment rendered in a justice's court should keep constant supervision of the justice's docket for the period of thirty days to prevent an appeal being taken therefrom without adequate security being given on the appeal. The remedy was the requirement that the undertaking be filed within five days and that notice of the filing of the undertaking should be given to him. No change was made by the amendment in regard to the time within which the respondent must except to the sufficiency of the sureties. This is still required to be done within five days after the filing of the undertaking, no reference being made to any notice of such filing. Notice of intention to file an undertaking would serve no useful purpose, as the service and filing of the notice of appeal would accomplish all that a notice of an intention to file an undertaking could do, as it implied that within five days the undertaking necessary to perfect the appeal would be filed. This is regarded as

sufficient notice of intention on appeals from the superior court. No reason exists for giving a notice in advance of the act, as no hearing was to be had or act done which required the presence of the adverse party when the instrument was presented to the justice. If considered as a notice to be given after the undertaking has been filed, there is no provision as to the time it should be served or the effect of a failure to serve it. The language used in the latter part of the section with respect to the notice to be given of the time of justification of sureties cannot be read into the first sentence, as petitioner suggests. Neither is it applicable by analogy.

If the failure to give notice of the filing of the undertaking should subject appellant to a penalty, such as that prescribed where the sureties fail to justify, there would have been no question as to the legislative intention. It is true, as argued by petitioner, that the absence of such a provision makes somewhat for the view that this notice is a step in perfecting the appeal, rather than a part of the collateral proceeding to justify, but its very nature and purpose make it part of the latter. Its sole use is to bring home to respondent the knowledge that the appeal is already perfected, at least, *prima facie*. Only after the appeal has been taken and rendered effectual to this extent can it serve any purpose. It merely invites the respondent to inspect the undertaking already filed in order to determine the sufficiency of the sureties executing it.

The justification of the sureties after notice is not a necessary step in taking an appeal. An appeal is *taken* by filing and serving a notice of appeal (sec. 974); it is perfected or made effectual by filing an undertaking "for the payment of the costs on appeal." The qualification by the sureties, upon this undertaking, in the absence of exception, is a full and complete justification. A further justification may be required by the respondent by excepting to the sufficiency of the sureties. This further justification is a collateral proceeding in which the respondent may exercise a right granted him to determine the adequacy of the security given for his protection on the appeal. This he may waive, and if he fails to exercise his right to except, or fails to attend before the court when the sureties are in attendance for the pur-

pose of justifying, the appeal remains perfected and effectual under the undertaking as originally filed, just as it does when he does not except. (*Bank of Escondido v. Superior Court*, 106 Cal. 43, 47, [39 Pac. 211].) If, however, after exception properly made, the sureties fail to justify within five days, "the appeal must be regarded as if no such undertaking had been given." (Sec. 978a; *Wood v. Superior Court*, 67 Cal. 115, [7 Pac. 200]; *McCracken v. Superior Court*, 86 Cal. 76, [24 Pac. 845]; *Bennett v. Superior Court*, 113 Cal. 440, [45 Pac. 808]; *Lane v. Superior Court*, 5 Cal. App. 762, [91 Pac. 405].)

The question here under consideration was not before the court of appeal for the third district in *Stimpson etc. Co. v. Superior Court*, 12 Cal. App. 536, [107 Pac. 1013]. In that case there was an entire failure to file any undertaking after giving the notice of appeal, the undertaking relied on having been executed and filed "months before the trial."

In the absence of some clearly expressed intention upon the part of the legislature to make jurisdictional the serving of a notice the sole purpose of which is what we have declared this one to be, we feel constrained to hold that the failure to do so does not deprive the superior court of jurisdiction to hear an appeal in which the other steps provided by the statute are regularly and properly taken.

The demurrer to petition is sustained and the writ denied.

[Civ. No. 763. First Appellate District.—April 11, 1910.]

In the Matter of the Estate of JOSEPH GOETZ, Deceased.
EMMA BOEHM et al., Appellants, v. LOUIS ALBERT
GOETZ et al., Respondents.

CONTRACT TO SELL LAND—USE OF WORD "SOLD"—DEPOSIT—POSSESSION OF PURCHASER—DEED IN ESCROW—NONPAYMENT—AGREED CANCELLATION.—The use of the word "sold" in a contract for the purchase and sale of real estate does not conclusively show a present conveyance; and where the purchaser merely made a deposit of money with an agreement to pay the residue of the price, and was allowed to take possession, and a deed was placed in escrow, to be delivered only when the full price was paid, which the purchaser

failed to pay, and the whole transaction was canceled by mutual agreement, and the deed returned to the vendor, and the deposit to the purchaser, the contract, together with the conduct of the parties, can be construed only as an agreement of sale, and not a conveyance, and the title never passed to the purchaser.

ID.—TITLE UNDER WILL OF DECEASED VENDOR—CONTRACT OF SALE NOT AN EQUITABLE CONVERSION—CANCELLATION DURING LIFE OF VENDOR.—The contract of sale cannot be deemed an equitable conversion of the land sold into money, so that the title thereto cannot pass under the will of the deceased vendor, where the cancellation of the contract was fully effected by agreement of the parties thereto during the life of the vendor.

ID.—EQUITABLE CONVERSION PRECLUDED BY CIVIL CODE—EFFECT OF WILL—REMEDIES OF PURCHASER.—The doctrine of equitable conversion is precluded by the terms of section 1301 of the Civil Code, providing that "an agreement made by a testator for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors if the same had passed by succession."

APPEAL from an order of the Superior Court of the City and County of San Francisco, making partial distribution of a parcel of land to devisees under the will of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Louis Bartlett, and Wm. H. Gorrill, for Appellants.

P. A. Bergerot, A. P. Dessouslavy, and Jellett & Meyerstein, for Respondents.

KERRIGAN, J.—This is an appeal from an order of partial distribution, whereby a certain parcel of real estate in the city and county of San Francisco was distributed to the respondents.

The testator, Joseph Goetz, devised all his real estate owned by him at the time of his death to the respondents, who were his nieces and nephews. The surplus of his estate which remained after the payment of money legacies aggregating \$180,000 was bequeathed by him to the appellants and others.

Joseph Goetz executed his will May 11, 1904. He died July 1, 1907. On January 7, 1907, he and E. C. Chapman had executed an instrument in writing as follows:

“Chatfield & Vinzent,
“Real Estate, Mortgages, Loans and Insurance,
“51 Post Street.

“San Francisco, Jan. 7, 1907.

“Received from E. C. Chapman the sum of \$5,000.00, being deposit on account of \$75,000.00, United States gold coin, the purchase price of the property this day sold to him, as per the owner's authority, situated in the city and county of San Francisco, State of California, and described as follows.” (Here follows a particular description of the real property.)

“Terms of sale: 90 days allowed to examine title and consummate sale; at the expiration of said time the balance of said purchase money is due and payable upon tender of the deed of the property sold. If title is defective, thirty days are allowed the seller to perfect the same, and if, after the expiration of said time (unless extended by mutual consent) the title is incurably defective, then the deposit is to be returned at once. If the sale is not consummated in accordance with the foregoing conditions the deposit is to be forfeited. Time is of the essence of the contract. Taxes for the fiscal year 1906-07 to be pro rated. Title is to be approved by the Pacific Title Insurance Company, whose policy of insurance shall be evidence of good title.

“CHATFIELD & VINZENT.

“I, the said E. C. Chapman, hereby agree to purchase the above-described property and to comply with all the conditions therein contained.

“(Sale to be consummated at the office of Chatfield & Vinzent.)

“E. C. CHAPMAN.

“San Francisco, Jan. 7, 1907.

“I hereby approve the above sale.

“JOSEPH GOETZ.”

Two days after the execution of this contract, to wit, January 9th, Joseph Goetz signed a grant, bargain and sale deed

of said land to Chapman. On January 11th he duly acknowledged the same, and deposited it with the French-American Bank of San Francisco, with written instructions that it be delivered to Chapman on or before ninety days from date upon payment by Chapman of \$70,000, which amount was stated to be the balance of the purchase price of said property "as per contract of sale dated January 7, 1907." Subsequent to this date Chapman went into possession of said property and wrecked some of the buildings, and caused some of the bricks thereon to be cleaned. When the instrument of January 7th was executed Chapman paid the \$5,000 deposit therein mentioned. On April 25, 1907, Chapman and Goetz signed an agreement wherein it was provided that in consideration of the sum of \$2,000 additional deposit Chapman's time for the carrying out of the contract of January 7th was extended up to and including May 10, 1907. On May 9, 1907, Goetz signed and delivered a receipt to Chapman for \$93.10, being interest for ten days from the 10th to the 20th of May on \$68,000, the balance due Goetz from Chapman on the "contract of sale" of said property. On May 24, 1907, in the presence of Goetz and Chapman, the contract of January 7th was marked "canceled"; the deed which had been on deposit with the French-American Bank was returned to Goetz, and, in the language of Chapman, "the deal was off."

The respondents claim under a devise by the testator of all the real estate owned by him at the time of his death, which includes the parcel now in dispute. Appellants, on the other hand, contend that the instrument of January 7th operated as a grant, bargain and sale deed from Goetz to Chapman, and that consequently Goetz at the time of his death no longer owned the land; or that if the instrument was not such conveyance it operated in equity to convert the realty into personalty; so that in either event the property would not be carried by the devise to the respondents.

We cannot agree with the contentions of appellants. It is true that in the contract in question the word "sold" was used, and that Chapman went into possession of the property and wrecked some of the buildings. But it is conceded, as of course it must be, that the word "sold" does not conclusively show a present conveyance. (*Blackwood v. Cutting*

Packing Co., 76 Cal. 212, [9 Am. St. Rep. 199, 18 Pac. 248]; *Eaton v. Richeri*, 83 Cal. 185, [23 Pac. 286]; *Shainwald, Buckbee & Co. v. Cady*, 92 Cal. 83, [28 Pac. 101]; *Gallup v. Sterling*, 22 Misc. Rep. 672, 49 N. Y. Supp. 942; *Brooks v. Libby*, 89 Me. 151, [36 Atl. 66]; *Cooley v. Miller & Lux*, 156 Cal. 510, [105 Pac. 981]; *Payne v. Neuval*, 155 Cal. 46, [99 Pac. 476].) And the possession by Chapman only shows that the parties intended to carry out the contract. Later, however, they changed their minds and canceled the arrangement. The instrument was not called by the parties a deed, nor was it executed with the formalities of such a document, and it was not regarded as a conveyance by either Goetz or Chapman. The fact that a deed to the property was deposited with the bank by Goetz shows that Goetz at least did not regard the agreement of January 7th as a deed. Moreover, Chapman's signature to the contract is preceded by the words "I agree to purchase." The \$2,000 paid by him was referred to in the receipt not as a part payment, but as an additional deposit. Finally the conduct of the parties to the transaction with reference thereto, and particularly on May 24th, when in the presence of Chapman the deed was returned to Goetz by the bank and the contract marked "canceled," indicates that they never intended that the agreement of January 7th should divest Goetz of his title.

Upon a consideration of the whole instrument, together with the conduct of the parties, it is very plain to us that the instrument was an agreement of sale and not a conveyance.

Equally without merit is appellants' contention that if the agreement in question be construed as a contract of sale instead of a conveyance, it effected an equitable conversion of the property from real estate into personal estate, and that the property must therefore fall into the residue of personal estate and be distributed to the testator's legatees. This contention is based upon the theory that the contract was subsisting, valid and enforceable at the time of the death of Goetz; but the court found on ample evidence that on May 24th "the said agreement for the purchase of said property was entirely canceled and rescinded by agreement then entered into between the said decedent and the said Edgar C. Chapman," and that thereafter Goetz "returned and paid

to said Edgar C. Chapman the said sum of \$5,000 paid on account of said purchase price as aforesaid." Another conclusive answer to this contention is that section 1301 of the Civil Code operated to prevent the application of the doctrine of equitable conversion (even if it had been otherwise applicable). That section reads as follows: "An agreement made by a testator for the sale or transfer of property disposed of by a will previously made does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement for a specific performance or otherwise against the devisees or legatees as might be had against the testator's successors if the same had passed by succession."

The order is affirmed.

Hall, J., and Cooper, P. J., concurred.

[Civ. No. 668. First Appellate District.—April 11, 1910.]

W. I. STONE, Respondent, v. SAN FRANCISCO BRICK COMPANY, a Corporation, Appellant.

ASSUMPSIT—WORK, LABOR AND MATERIALS—PLEADING—STATUTE OF LIMITATIONS—INADVERTENT FINDING—CLERICAL ERROR.—Under a complaint in *assumpsit* for the reasonable value of work and labor done and materials furnished to plaintiff's assignor, at defendant's request, "within two years last past," a finding made one year later, sustaining the averments of the complaint, but following its language "within two years last past," evidently used those words inadvertently. The form of such finding is not to be commended, and should be avoided; but where the vital questions of fact presented by the pleadings are answered by the findings, and the substance of the finding complained of is supported by the evidence, the judgment should not be reversed or a new trial granted for what so clearly appears to be a mere clerical error.

Id.—FINDINGS CONSIDERED AS A WHOLE—CAUSE OF ACTION SUSTAINED—IMMATERIAL FINDING DISREGARDED.—The findings must be read together as a whole, and where the court found that prior to the commencement of the action the claim stated in the complaint was assigned to the plaintiff, and also found in response to a plea of the two years' statute of limitations that the cause of action was not barred by limitation, and found the value of the work and

labor done and materials furnished, and the nonpayment of the debt, such findings substantially showed that the debt accrued within two years before the commencement of the action; and, under these circumstances, the finding containing the words "within two years last past," is immaterial, and should be disregarded.

ID.—PROOF OF CONTENTS OF DESTROYED BOOK—ADMISSION OF COPY—UNTENABLE OBJECTION—ABSENCE OF PREJUDICE.—Although a book which is not one of original entry is inadmissible, yet where a book of original entry has been destroyed by fire, the contents thereof may be proved by any witness having knowledge of its contents, and where the bookkeeper testified that the books were correctly kept, and that a purported copy thereof was correct, the admission in evidence of such over an untenable objection cannot require a reversal, especially where the admission is without prejudice, since the court did not base its findings or judgment thereupon, but based them upon other evidence. Any error not affecting the substantial rights of the parties must be disregarded, under section 475 of the Code of Civil Procedure.

ID.—REFRESHING MEMORY OF WITNESS—USE OF MEMORANDUM.—A witness is entitled to refresh his memory by the use of a memorandum made at the dictation and under the direction of the witness, when the facts were fresh in his memory, and he knew that the facts were correctly stated therein.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

'Ames & Manning, for Appellant.

Cushing, Grant & Cushing, for Respondent.

HALL, J.—Plaintiff sued to recover the sum of \$854 as the reasonable value of work and labor performed for and materials furnished to defendant by plaintiff's assignor, at the special instance and request of defendant.

Plaintiff recovered judgment for the sum of \$500, from which and the order denying its motion for a new trial defendant appealed to this court.

The action was commenced by the filing of the complaint on the eighteenth day of May, 1907, which alleged the performance of the work, etc., within two years last past. The findings were signed and filed on the twenty-first day of May, 1908. The court, following the language of the complaint,

found "That within two years last past, at the City and County of San Francisco, said Union Machine Company performed work, labor and services for said defendant corporation at its special instance and request, in making and repairing various kinds of machinery and metal appliances, and during said time said Union Machine Company furnished materials to defendant in and for said work on the like request."

This finding is attacked by appellant as not supported by the evidence and as evasive and not responsive to the issues presented by the pleadings. The point of the attack is that the words "two years last past" refer to the two years immediately preceding the date of the filing of the findings and not to the period preceding the filing of the complaint, while the evidence in the case shows without conflict and with certainty that all the work was done and all material furnished before the great earthquake and conflagration which occurred in April, 1906, more than two years before the filing of the findings.

Undoubtedly the words "within two years last past" as they occur in the findings were inadvertently used.

Findings must be read as a whole. In this case the court also found that "prior to the commencement of this action" the claim was assigned by said Union Machine Company to plaintiff, and in response to a plea of the statute of limitations, subdivision 1, of section 339, Code of Civil Procedure, found that the cause of action was not barred by the provisions of said section or by any other section of said code. The court also found as to the value and as to nonpayment of the debt.

Under these circumstances we think the finding that the services were performed and the materials furnished "*within two years last past*" was immaterial and should be disregarded. The gist and heart of the finding attacked is that the services were performed and the materials furnished by plaintiff's assignor to defendant at its special instance and request. If the court had simply so found without mentioning in that finding the period of time, the finding would have been sufficient, in connection with the other findings as to the assignment before the commencement of the action, as to the action not being barred, as to value, and nonpay-

ment, to support the judgment; for it thus appears that the debt accrued within two years before the commencement of the action.

The vital questions of fact presented by the pleadings are answered by the findings, and the substance of the finding attacked is supported by the evidence. The form of the finding is not to be commended, and such errors should be avoided, but we do not think that a judgment should be reversed or a new trial ordered for what so clearly appears to be a mere clerical error.

It is also claimed that the court committed error in permitting the witness Bepler to testify to the balance disclosed, just prior to the great fire, by the collection book kept by the bookkeeper and collector for the Union Machine Company (plaintiff's assignor). It had been shown that this and all other books kept by plaintiff's assignor had been destroyed by the fire of April, 1906. Evidence had also been given by the bookkeeper that he kept the books correctly.

Nevertheless the entry in this particular book was not admissible, for it was not the book of original entry, and was not of such a character as to come within the rule allowing the introduction by plaintiff of entries in his own books. But it is not at all clear that the objection made to the admission of the evidence was really pointed at the real vice of the evidence. While a general objection that the evidence was incompetent and hearsay was made, this was coupled with the specific objection "that the book is not shown to be kept in the handwriting of this witness, no entries were made there by him," which seems to have been the real point of the objection relied on. But the bookkeeper who did keep this book testified to the correctness of his books, and subsequently specifically testified to the correctness of this particular book. Under such circumstances, if the entries are admissible at all, and the book has been destroyed, the contents thereof may be further proved by any witness who has knowledge thereof. (Code Civ. Proc., sec. 1937.) So the specific objection made to this evidence was not well taken, and that this was understood by counsel and the court as the real point of the objection we think is manifest from what appears in the record and the original brief of appellant. Appellant in his objection did not suggest that the book was not a book of original entry, which would have

been the most appropriate and direct way to call the court's attention to the vice of the offered evidence; and in his brief he heads his discussion of the point with the words, "Error in admitting testimony of person not the bookkeeper as to contents of destroyed books," and concludes his discussion with a summary of his views to the effect that it is doubtful whether contents of destroyed books of account may be proved at all, and that if such proof may be made it must come from the bookkeeper.

But whether or not the vice of the evidence admitted was reached by the objection, we do not think that any error that may have been committed by the court in admitting such evidence is of sufficient importance in this case to require the granting of a new trial. The witness answered that the book showed a balance in favor of plaintiff's assignor of between \$700 and \$800, and he further testified that no payments were thereafter made by the defendant. The court however gave judgment for but \$500, thus showing that the evidence in question did not affect the judgment. The judgment rendered is amply sustained by other evidence. The challenged evidence was introduced in rebuttal after the defendant had given evidence as to the balance shown by its books. Under such circumstances we think this is a proper case for the application of the rule prescribed by section 475, Code of Civil Procedure, that error that does not affect the substantial rights of the parties must be disregarded.

Objection was also made to a witness refreshing his memory by the use of a memorandum made under his direction, but the ruling overruling this objection was not erroneous, for it appeared that the memorandum was made at the dictation and under the direction of the witness when the facts were fresh in his memory, and that he knew that the facts were correctly stated in the memorandum. (Code Civ. Proc., sec. 2047.)

The judgment and order are affirmed.

Cooper, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 11, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 9, 1910.

[Civ. No. 760. First Appellate District.—April 12, 1910.]

In the Matter of the Estate and Guardianship of JUANITA ALVERNA LINDNER, a Minor. MADGE MUTH, Appellant, v. EMMA DOMENICI, Respondent.

PARENT AND CHILD—ESTATE AND GUARDIANSHIP OF INFANT—PETITION OF MOTHER REFUSED—UNFITNESS—FINDING UNSUSTAINED—REVERSAL UPON APPEAL.—Upon appeal by a mother, after the death of the father, from an order refusing her petition for appointment as guardian of the person and estate of her young child three years of age, upon a finding of her unfitness to have the care and custody of the child, where the evidence fails to sustain such finding, the judgment and order denying her petition must be reversed.

Id.—RIGHT OF MOTHER TO CUSTODY OF CHILD.—Upon the death of the father, the mother is *prima facie* entitled to the custody of her young child, and cannot be deprived thereof, unless shown to be unfit by sufficient testimony. As against everyone except the father, the mother is by the law of God and man entitled as of right to the custody of her own child, and cannot be deprived thereof except upon a clear showing of her unfitness for the exercise of such right.

Id.—PRIOR RIGHT OF PARENTS.—The prior right of parents to the custody of their children under fourteen years of age cannot be disregarded except upon the most compelling reasons proved and sustained by the court.

Id.—WIFE'S SUIT FOR DIVORCE—TEMPORARY CUSTODY OF CHILD—PATERNAL UNCLE AND AUNT—EXPLANATION OF CONDITION OF CHILD.—Where pending the wife's suit for divorce the husband had placed the child with a paternal uncle, and by temporary agreement sanctioned by the court the husband was allowed to place it with its paternal aunt, the unkempt condition of the child testified to by the aunt was explained by its coming to her from the custody of its uncle and not from the wife, who testified that she always kept it clean.

Id.—FAILURE OF MOTHER FREQUENTLY TO VISIT CHILD EXPLAINED.—The fact the mother seldom visited the child during the life of the husband was explained by advice of her counsel not to visit it until she got her interlocutory decree, which was obtained two days before the death of the husband, after which she tried through her affection for the child to regain its custody.

Id.—ABSENCE OF SHOWING AS TO MORAL UNFITNESS—HEALTH OF CHILD. *Held*, that there was no testimony that the child had ever been ill, or that anything existed in the life of the mother that would militate against the moral well-being of the child.

ID.—GENERAL STATEMENTS BY UNFRIENDLY WITNESSES—OPPORTUNITIES OF OBSERVATION NOT SHOWN.—General statements by manifestly unfriendly witnesses, who are the brothers and sisters of the divorced husband, to the effect that the child was always filthy and that the mother did not keep her house clean, without any showing as to the opportunities possessed by them for real knowledge, do not meet the requirements of such evidence.

ID.—FINDING UNSUPPORTED.—Such general statements are not sufficient to warrant a finding that the mother was not a fit and proper person to have the care and custody of her own baby, there not being one word tending to show any loose or immoral conduct upon her part, or any neglect that has ever injured the health or physical well-being of the child.

ID.—RIGHT OF MOTHER TO REAR HER OWN OFFSPRING.—A mother who is both capable and willing and anxious to rear her own offspring should not be deprived of the opportunity thus to discharge the duty she owes to the child, without a clear showing of unfitness for the trust.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

McGowan, Squires & Westlake, for Appellant.

Hugo D. Newhouse, for Respondent.

HALL, J.—This is an appeal from a judgment denying appellant's petition to be appointed guardian of the person and estate of her own child and the order denying her motion for a new trial.

The court found that the petitioner was not a fit, proper or competent person to discharge the duties of guardianship or to be appointed guardian of said minor, who was then less than three years of age. The father of said child died before this proceeding was instituted, so unless the evidence fairly shows that the mother was not a fit or proper person to have the care and custody of her own child the judgment and order must be reversed.

Upon the death of the father the mother is *prima facie* entitled to the custody of her young child, and cannot be deprived of such custody unless shown to be unfit by suffi-

cient testimony. (*In re Campbell*, 130 Cal. 383, [62 Pac. 613]; *Guardianship of Salter*, 142 Cal. 412, [76 Pac. 51].)

The prior right of parents to the custody of their children under fourteen years of age "cannot be disregarded except on the most compelling reasons proven and sustained before the court." (21 Cyc. 34.)

The petition of appellant is in the usual form, and showed that the child had an estate of the value of \$500, and was then in the custody of Emma Domenici. When the matter came on for hearing Emma Domenici appeared with the child but filed no answer to the petition. The matter was heard upon three different days. At no time was it suggested by anyone that petitioner was in any way immoral or of bad habits. Prior to the death of the father of the child petitioner had brought a suit for divorce from him, and on the twenty-eighth day of January, 1907, an interlocutory decree of divorce was granted to her, in which the custody of the child was awarded to its father until further order of the court. The awarding of the custody of the child was in accordance with an agreement between the father and mother which contemplated that the child should be placed with its paternal aunt, Emma Domenici, but which likewise provided that such custody should be temporary only. The father died January 30, 1907, but the child had been given into his custody under the agreement December 24, 1906, and subsequently by him placed with Mrs. Domenici. After the death of the father petitioner remarried, and is now the wife of George Muth, and is able to provide for the child. The evidence taken upon the first and second days of the hearing disclosed that petitioner had visited the child but once since giving it into the care of its father, but nothing else was shown to her prejudice. Indeed, at the close of the second day's session the learned judge presiding expressed the view that this was a most unnatural act, and that she (petitioner) "thinks more of the \$500 that is in sight in the estate than she does of the person of the child. That is the only matter that is facing me at the present time."

At the next hearing it was shown without contradiction by letters that passed between her and her counsel, Frank McGowan, Esq., that she was advised by him that she had better not visit the child until the court rendered judgment

in the divorce suit. This occurred January 28, 1907. In February petitioner did call to see her child, and in March consulted with Mr. McGowan with a view to regaining its custody. She was then taken ill, but upon leaving her bed wrote to Mr. McGowan urging that steps be taken to get for her the child. Negotiations were at once commenced and carried on by Mr. McGowan, for her, with Mrs. Domenici and the attorney that had represented Mr. Lindner in the divorce case, until finally the petition was filed.

Several letters written by Mrs. Muth to her attorney were read in evidence. None of them refer to the money or estate of the child at all, but do show love and anxiety for the child. They are all expressed in good English, correctly spelled and show the writer to have a fairly good education. These letters and the evidence of Mr. McGowan and other evidence given after the intimation from the court as to its views fully explain in a satisfactory way the reasons why petitioner did not more frequently visit her child.

At the close of the hearing some evidence was given intended to show that petitioner had neglected the child. Emma Domenici testified that "When I got the baby we had to give her a bath. She was filthy. Her hair was not combed. . . . Her hair was matted." But it was shown without contradiction that the baby had for a week or more preceding been in the custody of its paternal uncle and not with its mother at all. She was therefore not responsible for this condition. Evidence was also given by the sister and brother of Mrs. Domenici in general terms that the baby was always filthy and dirty, and that petitioner did not keep her house clean. How frequently they visited the house of petitioner or what opportunities they had of really knowing what care she gave the baby was not shown.

Petitioner, after this testimony was given, again took the witness stand and denied its truth. She testified that she bathed the baby every day and always kept it clean.

There was not one word of testimony that the child had ever been ill, or that anything existed in the life of petitioner that would militate against the moral well-being of the child.

We fully recognize the rule that where there is any substantial evidence to support the finding of the trial court this court cannot interfere. But we likewise recognize that

as against everyone except the father the mother is by the law of God and man entitled as of right to the custody of her own child, and of this right she cannot be deprived except upon a clear showing of her unfitness for the exercise of such right.

General statements by manifestly unfriendly witnesses that the child was always filthy and that the mother did not keep her house clean, without any showing as to the opportunities for real knowledge possessed by such witnesses, do not meet the requirements for such a showing.

The general statements made by the brother and sisters of her divorced husband to the effect that she did not keep the child clean are not sufficient to warrant a finding that she is not a fit and proper person to have the care and custody of her own baby, there not being one word tending to show any loose or immoral conduct upon her part, or any neglect that has ever injured the health or physical well-being of the child. A mother who is both capable and anxious to rear her own offspring should not be deprived of the opportunity to thus discharge the duty she owes to the child, without a clear showing of unfitness for the trust.

The ends of justice require that this case be remanded for a new trial, to the end that a careful and full investigation may be had as to whether or not this mother should be deprived of the right to rear and care for her own child. The judgment and order are reversed.

Kerrigan, J., and Cooper, P. J., concurred.

[Crim. No. 154. Second Appellate District.—April 13, 1910.]

THE PEOPLE, Respondent, v. WILLIAM HOLMES, Appellant.

CRIMINAL LAW—TIME FOR FILING INFORMATION—NEW INFORMATION BY LEAVE OF COURT—CURE OF DEFECTS—CONSTRUCTION OF PENAL CODE.—Where a first information was filed within the thirty days after commitment by the examining magistrate as required in section 1382 of the Penal Code, that section has no application to a new information for the same offense filed by leave of the court, to cure defects in the original.

Id.—MOTION TO DISMISS NEW INFORMATION—PRESUMPTION AS TO PRELIMINARY EXAMINATION—NEW EXAMINATION NOT REQUIRED.—For the purpose of a motion to dismiss the new information under section 1882 of the Penal Code, it must be presumed to be based upon the original preliminary examination. No new preliminary examination is necessary.

Id.—FAILURE TO BRING CAUSE TO TRIAL WITHIN SIXTY DAYS—EXCUSE FOR DELAY—"GOOD CAUSE TO CONTRARY."—Regardless of whether a motion to dismiss the cause for failure to bring it on for trial within sixty days after the filing of the information be based upon the filing of the new information or of the original information, it was properly denied, where the affidavit filed and showing made by the district attorney, in excuse for the delay, showed "good cause to the contrary," within section 1880 of the Penal Code.

Id.—OBJECTION TO TIME OF TRIAL NOT SHOWN BY RECORD—PRESUMED CONSENT.—It is to be presumed that the time set for the trial was consented to where the record upon appeal shows that the defendant and his counsel were present in court when it ordered the cause set for trial on a date more than sixty days after the filing of the information, but fails to show that defendant or his counsel objected to such order.

Id.—EMBEZZLEMENT OF NOTES AND MORTGAGE—REQUESTED INSTRUCTIONS—BELIEF IN RIGHT OF TRANSFER—CLAIM "IN GOOD FAITH" LACKING.—Upon the trial of a charge of embezzlement of notes and a mortgage executed to defendant by a third party and intrusted to his possession for a specific purpose, and appropriated to his own use in violation of the trust, requested instructions that "if the evidence shows that defendant sold and transferred all his right, title and interest in and to the notes and mortgage, openly and avowedly, the defendant believing that he had the right so to do, you should acquit the defendant," and that "if the evidence shows the defendant believed the notes and mortgage was a part of a partnership fund belonging to defendant and the maker, you should acquit the defendant," were both properly refused, as failing to include in either the essential element of "a claim of title preferred in good faith" required by section 511 of the Penal Code.

Id.—ABSENCE OF EVIDENCE SHOWING "GOOD FAITH" OR "BELIEF OF OWNERSHIP"—WANT OF CONSIDERATION—TRUST FOR PURCHASE NOT MADE.—Where it appears that the notes and mortgage were deposited with defendant in trust to secure the purchase of one or more rooming-houses for the maker, and no right of defendant therein could ripen until such purchase was made and secured, and no such purchase was ever made or attempted, and the notes and mortgage were otherwise wholly without consideration, and when they were converted to defendant's use, he immediately left the state, there is no evidence upon which either "good faith," or

"belief of ownership" could be predicated, even if the instructions requested were within the letter of section 511 of the Penal Code.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank R. Willis, Judge.

The facts are stated in the opinion of the court.

S. G. Barker, Charles E. Williams, and G. M. Spicer, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

TAGGART, J.—Defendant was informed against for the crime of embezzlement charged to have been committed in the county of Los Angeles on March 5, 1909, by appropriating and converting to his own use three promissory notes of the value of \$150 each and a mortgage for \$450 executed to him by one Nellie Messinger and which had been intrusted to his control and possession. An information was filed July 17, 1909, on which defendant was arraigned and to which he filed a demurrer which was overruled; and thereafter he entered a plea of not guilty and the trial of the cause was set for September 20, 1909. August 10, 1909, a new information was filed by order of the court, on which defendant was arraigned and given until August 18, 1909, to plead. On that day, and before entering a plea, he made a motion to set aside the information on the ground that he had not been legally committed by a magistrate, and also a motion to dismiss the action because the new information had not been filed within thirty days after he had been held to answer. Both of these motions were denied; whereupon he filed a demurrer to the new information, which being overruled, he entered a plea of not guilty to the charge contained in the new information, and thereupon, by consent of defendant, the trial of the cause was set for September 17, 1909. In the minutes of the court for September 17, 1909, appears the following order: "The District Attorney with the defendant and his counsel being present in court, and this being time set for trial of this cause, and the time of the

court being occupied with other matters, trial of this cause is set for September 27, 1909, at 10 a. m." On September 27th defendant filed a motion to dismiss the prosecution of the action on the ground that the cause had not been brought on for trial within sixty days after the filing of the information. Leave and time were given to the district attorney to file affidavits excusing the delay in bringing the cause to trial, and to the defendant to file counter-affidavits if he desired. No showing other than the record was made by the latter, but the attorney in charge of the cause filed his own affidavit setting out the foregoing matters, the accumulation of business in the criminal courts and the conditions of the calendar and facts tending to show that it was not possible to bring the cause to trial at an earlier date. The motion was overruled and the cause proceeded to trial and the defendant was found guilty as charged. After his motions for a new trial and in arrest of judgment were overruled, he was sentenced to imprisonment in the state's prison for five years, the defendant appealing from the judgment in open court.

The rulings of the trial court upon all the foregoing motions made by defendant were excepted to and are assigned as error for review on this appeal. Only the two motions to dismiss the prosecution, made under the provisions of section 1382 of the Penal Code, however, are specially presented, and the only authority cited in support of appellant's contention in respect to these is the section itself. Defendant also assigns as error the refusal of the trial court to give to the jury two certain instructions requested by him. The first of these reads as follows: "You are instructed that, if the evidence shows that the defendant sold, assigned and transferred all his right, title and interest, in and to the notes and mortgage, openly and avowedly, the defendant believing he had the right so to do, that you should acquit the defendant." The second as follows: "You are instructed that if the evidence shows that the defendant believed the notes and mortgage was a part of a copartnership fund belonging to the defendant and Mrs. Messinger, that you should acquit the defendant."

The motion to dismiss a prosecution because the information has not been filed within thirty days after the defendant

is held, which may be made under section 1382 of the Penal Code, is but a penalty prescribed for a violation of section 809 of the code, which requires the district attorney to file the information within thirty days after examination and commitment by the magistrate, but this section has nothing to do with the time within which a new information may be filed. (*People v. Lee Look*, 143 Cal. 216, 221, [76 Pac. 1028].) The first information was filed in this cause before the expiration of the thirty days, and the new information was for the same offense, giving a more complete statement of the facts, for the purpose of supplying a defect in the original. The latter was filed upon the order of the court, and, for the purpose of this motion, must be presumed to be based upon the examination before the preliminary magistrate. No new preliminary examination is necessary. (*Ex parte Nicholas*, 91 Cal. 643, [28 Pac. 47].)

In presenting the motion to dismiss because the cause was not brought on for trial within sixty days after the filing of the information, the date of the filing of the original information is relied upon by appellant, instead of the date of the filing of the information upon which the trial was had. If it be conceded that the date of the filing of the original information is the one which should be considered in connection with this motion, the motion was, nevertheless, properly denied. The affidavit filed and showing made by the district attorney in excuse of the delay was sufficient to justify the court in denying the motion, as the matter in the affidavit showed "good cause to the contrary." (Pen. Code, sec. 1382; *People v. Moran*, 144 Cal. 48, 56, [77 Pac. 777].) In addition to this, it does not appear from the record that the defendant objected to the setting of the cause for trial on a date more than sixty days after the filing of the information, he and his counsel being present in court at the time when the case was set for trial on September 27, 1909. (*People v. Douglass*, 100 Cal. 1, 4, [34 Pac. 490].)

The first instruction refused by the court was no doubt an attempt to state the law covered by section 511 of the Penal Code: "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred

in good faith, even though such claim is untenable." The instruction fails to include the transactions intended to be covered by section 511. It contains no element of claim of title in good faith by the defendant, but informed the jury that if defendant transferred his interest in the notes and mortgage, believing that he had the right to transfer his interest therein, he should be acquitted. Section 511 is predicated upon an avowed claim in good faith of the entire title to the property appropriated. We think, also, there is an absence of any express claim upon the part of defendant that he in good faith owned the notes and mortgage at the time he converted them to his own use, and of evidence from which a reasonable inference to this effect could be drawn.

The second instruction was only another way of stating the same legal proposition attempted to be covered by the first, but limiting the claim of title to a special or copartnership right in the property. There is the same failure to include the essential element of claim of title preferred in good faith which is apparent in the first instruction. Whether we accept the theory of the prosecution that the deposit of the notes and mortgage with defendant related to the purchase of only one rooming-house, or that of the defendant that it also included the purchase of others or another, the only reasonable inference to be drawn from the evidence is that the defendant's right to the notes and mortgage did not ripen until the rooming-house or houses had been purchased, and that he merely held them in trust as an earnest of the complaining witness' good faith that she would become a partner when the purchase or purchases were completed, and this contingency never occurred.

There is no evidence that defendant ever gave anything as a consideration for the notes and mortgage; he never made any purchases of any rooming-house, and, according to the uncontradicted evidence of the witness best qualified to say, he never even had an option on the property in connection with which he claimed the right to use the complaining witness' notes. He made no effort to close up any of the transactions upon which his right to the notes depended, and as soon as he converted the property which he is charged with embezzling he immediately left the state. We are un-

able to see any evidence upon which good faith and belief of ownership could have been predicated, if either of the instructions had been within the letter of section 511.

No cause for a reversal being presented, the judgment is affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 803. First Appellate District.—April 14, 1910.]

HENRY I. KOWALSKY, Plaintiff, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CRUZ, and the Hon. LUCAS F. SMITH, Judge Thereof.

ESTATES OF DECEASED PERSONS—CLAIM ALLOWED AND SETTLED—LAPSE OF TIME—MOTION TO VACATE—WANT OF JURISDICTION—PROHIBITION.—The superior court has no jurisdiction to vacate a claim allowed and settled, which has become final by the lapse of time, and prohibition will lie to prevent the vacation thereof on motion of the administrator of the estate.

ID.—APPEAL NOT ALLOWED FROM VACATING ORDER—ABSENCE OF LEGAL REMEDY.—No appeal is allowed from an order vacating an allowed claim against the estate; and no other provision appears giving any legal remedy against such order.

ID.—CLAIM PASSED INTO SETTLEMENT OF ACCOUNT—CONCLUSIVENESS.—When, by the allowance of claims in a former settled account presented by the administrator, the claim involved has passed into the category of claims “passed upon in the settlement of a former account” as provided in the Code of Civil Procedure, it is thereby conclusively established against all persons interested in the estate, in the absence of an appeal therefrom, or of any relief obtained therefrom under section 473 of the Code of Civil Procedure.

ID.—SEPARATE LIST OF CLAIMS NOT REQUIRED—“EXHIBIT” IN ACCOUNT. The provision of section 1628 of the Code of Civil Procedure that every account must exhibit all debts which have been presented and allowed during the period embraced in the account does not require that a separate list be made of the claims allowed. The setting forth of the particulars of each claim and of the manner of its presentation is a sufficient “exhibit” of the debts presented and allowed in the account.

ID.—MATURITY OF NOTE AFTER DEATH.—The fact that the note allowed and settled as a claim against the estate matured after the death

of the deceased is no objection to the conclusiveness of its settlement as an allowed claim in the administrator's account, when that account became absolutely final.

APPLICATION for writ of prohibition to the Superior Court of Santa Cruz County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

Rothchild, Golden & Rothchild, for Petitioner.

Lent & Humphrey, for Respondent.

HALL, J.—This is an original proceeding brought in this court to obtain a writ, prohibiting the superior court of Santa Cruz county and the judge thereof from proceeding to hear or grant a motion made by the administrator of the estate of Margaret McLaughlin, deceased, for an order setting aside the allowance and approval of a claim of plaintiff against said estate theretofore made by the judge of said court.

An alternative writ was issued, and the defendant made return thereto both by demurrer and answer.

From the record before us it appears that the plaintiff, on the twenty-fifth day of June, 1907, presented to Frank McLaughlin, the then administrator of the estate of said Margaret McLaughlin, deceased, his claim for the sum of \$1955.49 upon a promissory note, executed by said Frank McLaughlin and indorsed by said Margaret McLaughlin; that said claim was approved by said Frank McLaughlin as such administrator on said day, and thereafter on the same day the claim was approved and allowed by the judge of said court and duly filed. Thereafter said Frank McLaughlin having died without completing the administration of said estate, Samuel N. Rucker was appointed administrator of said estate, and thereafter, to wit, on the ninth day of December, 1909, said Rucker, as such administrator, filed and presented to the court a "full report and account of the administration of the estate of Margaret McLaughlin, deceased, from the commencement thereof to the first day of October, 1909"; that thereafter, on the twentieth day of December, 1909, after due notice given, the said account was duly "settled, ap-

proved and allowed." This order has not been attacked by appeal or otherwise; at least the record before us discloses no such attack; neither has it been suggested in the oral argument or otherwise that an attack has as yet been made upon the order settling and approving said account.

On the second day of March, 1910, said Rucker, as such administrator, gave notice of a motion for an order of the court setting aside the allowance made by the judge of said court June 25, 1907, of plaintiff's claim. It is the jurisdiction of the court to entertain and grant such motion that is attacked by this proceeding.

Defendant suggests that if the court should grant the motion plaintiff would have a plain, speedy and adequate remedy by appeal under section 963, subdivision 3, Code of Civil Procedure, but a reading of said section discloses that no appeal is given thereby from an order vacating the allowance of a claim against an estate. We have been cited to no other provision of the law giving plaintiff any remedy against an order setting aside the allowance of a claim against an estate, and we know of none.

Therefore if defendant is proceeding without jurisdiction in the matter in controversy, plaintiff is entitled to the writ as prayed for.

Plaintiff claims that in no event may the administrator by motion made more than six months after the allowance of a claim, procure the setting aside of such allowance; and that in the case at bar the allowance of plaintiff's claim has been placed beyond attack by anyone by the order settling and approving the administrator's account, in which it is claimed this claim was exhibited as an allowed claim.

In reply to the first proposition defendants cite *Barker's Estate*, 26 Mont. 279, [67 Pac. 942], and *Cone v. Crum*, 52 Tex. 348. Neither case is in point. In *Barker's Estate* the attack was by the widow of the decedent against a claim that had been allowed in favor of the administrator, and the attack was made upon the hearing of his account.

Cone v. Crum decides that the administrator may maintain an action in equity, brought within a short time after the allowance of the claim, where the allowance was made by mistake and through inadvertence.

However, it is not necessary for us to pass upon the question as to whether or not the administrator may under any circumstances take action to set aside the allowance of a claim against the estate, for we think that by the allowance of the account presented by the administrator December 9, 1909, the claim of plaintiff passed into the category of claims, "passed upon on the settlement of a former account" (Code Civ. Proc., sec. 1636), and was thereby conclusively established against all persons interested in the estate, in the absence of any appeal from such order or attack thereon under section 473, Code of Civil Procedure.

In all material respects the facts of this case are like those in *Estate of McDougald*, 146 Cal. 191, [79 Pac. 878], where it was said, "When an account is presented for settlement after due notice, as in this case, any creditor or person interested may contest the same, and may object to any item of charge or credit, or to any claim allowed and not passed upon on the settlement of any previous account, and may thereupon have his objection settled and determined. (Code Civ. Proc., secs. 1635, 1636.) The settlement of an account and the allowance thereof by the court is conclusive against all persons in any way interested in the estate. (Code Civ. Proc., sec. 1637.) One whose claim has been rejected and who is prosecuting a suit upon it against the estate is a person interested, who may make such a contest, and who is concluded by the settlement of a previous account. The first account of the administratrix set forth her claim as one of the allowed claims against the estate. This was sufficient to notify all persons interested that the validity of this claim would be determined and established by the settlement of the account as rendered. No objection or contest was made; the account was settled, allowed and approved as rendered, and thereupon this claim, with the others mentioned in the list, passed into the class of claims passed upon in the settlement of a former account (sec. 1636), was conclusively established against all persons in any way interested, and its validity was not thereafter subject to attack upon the hearing of any subsequent account. A judgment or order of a court having jurisdiction is conclusive of all matters involved which might have been disputed at the hearing, although

no objection was in fact made. This rule applies to the settling of accounts the same as to any other proceeding."

In the report containing the account presented by the administrator to the court December 9, 1909, three allowed claims are set forth. One of the three is the claim of plaintiff. As to this claim it is there said, "That after the said time for presentation of claims against said estate had fully expired, the claim of H. I. Kowalsky was presented for \$1955.47, claimed to be due on the promissory note of said Frank McLaughlin, such note purporting to have been indorsed by said Margaret McLaughlin by her writing her name across the back thereof at the time of its execution, to wit, November 30th, 1904; that said last-mentioned note was made payable one year after date, to wit, on November 30th, 1905; and said claim therefor states that when said note became due, viz., November 30th, 1905, the same was presented by claimant to and payment demanded of the maker, said Frank McLaughlin, who failed to pay the same; that said claimant thereupon, after presentation as aforesaid, and upon said 30th day of November, 1905, gave notice in writing to said Margaret McLaughlin of the said demand and the failure of said Frank McLaughlin to pay said note; that said Margaret McLaughlin's death had occurred prior to the said maturity of said note, to wit, on said 16th day of November, 1905; that it is further stated by claimant in his verification of said claim that he had been a resident of New York, and had not been in the State of California for more than two years continuously preceding the 23rd day of April, 1907, the date of such verification; that said claim was allowed against said estate and filed therein on the 25th day of June, 1907, for the amount stated in such claim."

The statute requires that "Every account must exhibit all debts which have been presented and allowed during the period embraced in the account." (Code Civ. Proc., sec. 1628.) The setting forth of the particulars of this claim, and the manner of its presentation and allowance, was certainly an *exhibit* of the debt thus presented and allowed. It was not at all necessary that a separate list be made of the claims allowed, as is sometimes done. The statute only requires that the debts allowed be exhibited in the account. In this case the debts were listed and fully set forth in the

report, which likewise set forth the amount of money received and expenses incurred and money expended. Everything done, including moneys received and expended, and expenses incurred but not paid, and debts allowed, was submitted in the form of a report to the court. The report and account, which is annexed to defendant's answer herein, purports to be "the full report and account of the administration of the estate of Margaret McLaughlin, deceased, from the commencement thereof to the 1st day of October, 1909." This particular claim and the action of the administrator and of the judge in allowing and approving it were thus presented for the final action of the court upon settlement of the account. Although the court found all matters stated in the report to be true, which includes the statement that Margaret McLaughlin had died before the maturity of the Kowalsky note, the court approved the account as rendered. This was an approval of all allowed debts exhibited with the account, and included the claim of plaintiff, which thus passed beyond attack except by an appeal from such order or other direct attack thereon. (Code Civ. Proc., secs. 473, 1737; *Estate of McDougald*, 146 Cal. 191, [79 Pac. 878].)

The court therefore has no jurisdiction to grant the motion of the administrator to set aside the allowance of the claim, and the writ must issue as prayed for.

It is so ordered.

Cooper, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 13, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 13, 1910.

[Civ. No. 662. Third Appellate District.—April 14, 1910.]

**JOHN LOEFFLER, Appellant, v. W. H. WRIGHT et al.,
Respondents.**

ACTION BASED ON LEASE—EXPIRED TERM—OPTIONS TO RENEW AND PURCHASE—DAMAGES FOR WITHHOLDING—CAUSE OF ACTION NOT STATED.—Where plaintiff's alleged rights to have a lease with options to renew and to purchase declared valid, and to recover damages for withholding possession of the leased land and the improvements thereon made by the lessee, are based upon the terms of the lease, the original term of which had expired, the plaintiff must by appropriate averments bring himself within its terms, and where he fails to allege any facts showing that the lease was renewed or extended, or that the options to renew or to purchase were in any way exercised, or that any rent was paid thereunder, it states no cause of action, and a demurrer to the complaint was properly sustained.

ID.—NATURE OF ACTION—DAMAGES FOR FAILURE SPECIFICALLY TO PERFORM AGREEMENT TO LEASE.—The action is essentially one to recover damages for a failure specifically to perform an agreement to lease for a period of years; and a person seeking such relief must show that he placed himself in such a position as to exact performance from the other party.

ID.—TIME FOR RENEWAL—NOTICE OF ELECTION.—Under a contract for a renewal of the lease, as distinguished from an extension of the lease, the lessee desiring to renew must exercise his option to do so by giving notice of his election to renew before the expiration of the original term.

ID.—OPTION TO PURCHASE—ELECTION AND EQUITABLE RIGHT MUST APPEAR.—An option to purchase contained in the lease must, for its enforcement, not only be alleged to have been exercised by notice of the election to purchase during the life of the lease, but also an offer to pay the purchase money, or willingness to do so, must be alleged, and it must be further alleged that the contract of purchase was just and equitable.

ID.—BANKRUPTCY OF LESSOR—JURISDICTION OF DISTRICT COURT.—When the corporation lessor was adjudged a bankrupt, the United States district court acquired complete and exclusive jurisdiction of the corporation's property, and to determine all controversies between the corporation and third parties affecting the assets in its custody.

ID.—COMPOSITION CONFIRMED—REVESTITURE OF PROPERTY—COLLATERAL ATTACK FOR IRREGULARITY.—A composition confirmed by the district court, having the effect to revest title of the corporation to its remaining assets, cannot be collaterally attacked in a state court

for irregularity in the order of composition not appearing on its face.

Id.—EXCLUSIVE REMEDY IN FEDERAL COURT FOR FRAUD—APPELLANT ESTOPPED.—The exclusive remedy for fraud in obtaining the order of composition was by a proceeding in the district court under the bankrupt act providing for its annulment for fraud discovered within six months; and where appellant availed himself of that remedy, and his application was denied by the district court, the appellant cannot assail it in the state court, whether the composition be valid or a nullity.

Id.—RELIEF AGAINST DEED OF TRUST FOR MISREPRESENTATION OF CONTENTS—STATUTE OF LIMITATIONS—NOTICE OF CONTENTS.—Relief against a deed of trust by the corporation lessor for fraud upon the plaintiff as lessee, consisting of misrepresentation as to its contents, was barred within three years after actual or constructive notice of the contents of the deed.

Id.—NOTICE OF DEED OF TRUST—SIGNATURE AND ACKNOWLEDGMENT BY PLAINTIFF AS SECRETARY—RECORD.—The complaint shows both actual and constructive notice to plaintiff of the contents of the deed of trust, by alleging that it was signed and acknowledged by plaintiff as secretary of the corporation lessor, and was recorded, upon such acknowledgment, before the lease was executed, and presumably more than three years before the commencement of the action.

Id.—DATE OF FILING ORIGINAL COMPLAINT NOT SHOWN—PRESUMPTION—INTENDMENTS UPON APPEAL.—Though the date of the filing of the original complaint is not shown by the record upon appeal, it must be assumed, in view of the intendments in favor of the ruling of the court below against the plaintiff, that the action was brought more than three years after the execution of the deed of trust.

Id.—INSUFFICIENT AVERMENT—DATE OF DISCOVERY—REASONABLE DILIGENCE NOT AVERRED—PRESUMPTION.—It is not sufficient for the plaintiff merely to allege that he did not discover the fraud until a certain date. It must also appear that the discovery could not have been made by the exercise of reasonable diligence; and the plaintiff is presumed to have known all that reasonable diligence would have disclosed.

Id.—DEMURRER SUSTAINED WITHOUT LEAVE TO AMEND—DISCRETION NOT ABUSED—PREVIOUS DEMURRERS—LEAVE NOT ASKED.—The sustaining of the demurrer without leave to amend is within the discretion of the court below, subject only to review in case of clear abuse. No abuse of discretion appears where it appears that plaintiff made three ineffectual attempts to state a cause of action, and his record upon appeal does not disclose that he asked leave to amend when the present demurrer was sustained.

APPEAL from a judgment of the Superior Court of Contra Costa County. Wm. S. Wells, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, for Appellant.

Joseph C. Meyerstein, H. U. Brandenstein, and W. S. Tinning, for Respondents.

BURNETT, J.—Several diverse and somewhat uncorrelated acts alleged to be fraudulent are made apparently the basis of appellant's claim for relief and much evidentiary matter is pleaded in the second amended complaint, but it is contended by him that "There is only one cause of action set forth therein, and that is to have plaintiff's lease and option to purchase declared valid and superior to the claims of all the other defendants, and for damages for depriving plaintiff of the possession of said land so leased and covered by his option to purchase and the valuable improvements thereon including his hotel, pickle factory, machinery, stock and supplies."

Adopting this theory of the complaint, the essential facts may be somewhat briefly presented. The initial transaction was with a corporation known as the Jersey Island Packing Company. It is alleged that three of the directors of said corporation who were the principal stockholders and are defendants herein, on and prior to the eleventh day of June, 1903, made certain false and fraudulent representations to plaintiff as to the financial condition of said corporation and thereby induced plaintiff to purchase three thousand and sixty shares of the capital stock thereof for the sum of \$91,800 and to make valuable improvements upon the real estate belonging to said corporation known as the Jersey Island Tract "and which was the same land that was thereafter leased to plaintiff for the term of seven and one-half years, on the 16th day of December, 1903, and which on the same day the said corporation agreed to sell to plaintiff at any time during the aforesaid period of seven and one-half years, as fully appears in said lease and agreement to sell, a copy of which is hereto attached and marked 'Exhibit A.' That thereafter on or about the — day of December, 1903,

the said corporation . . . agreed to cancel the agreement whereby plaintiff purchased said stock and made said improvements upon said realty, and to return to plaintiff the purchase price thereof, save and except the sum of three thousand dollars, and the cost price of said improvements, amounting to twenty-six thousand dollars more, which the directors claimed said corporation was unable to pay and in consideration thereof the said corporation then and there agreed to and with plaintiff that it would lease to him said one hundred acres of the aforesaid realty upon which said improvements were located for a period of seven and one-half years, and give him an option and agreement whereby he might purchase said land and improvements at any time within said period for the sum of twenty thousand dollars; and that the plaintiff agreed to said proposition on the part of said corporation, and further agreed that upon the execution and delivery to him of said lease and agreement of sale he would return his stock which had been theretofore sold to him as aforesaid, to the officers of said corporation, and resign his position as director of said company; and that after such agreement had been duly made as aforesaid, the said manipulators, W. H. Wright, Frank V. Wright and H. Bendel, acting for and on behalf of said corporation, refused to make, execute or deliver said lease to plaintiff, according to said agreement, for the reason that it would interfere with and take precedence of the fraudulent trust deed which said manipulators and wreckers had fraudulently designed to have executed, as hereinbefore set forth.

“That after the manipulators refused, as aforesaid, to carry out and execute said option to buy and agreement to lease, said fraudulent deed of trust was gotten up, as hereinafter set forth, and the same was placed on record on said 19th day of September, 1903, in order that the same might take precedence of said option and lease, without plaintiff's knowledge of its existence or recordation, and that thereafter on the 16th day of December, 1903, the said corporation in pursuance of said agreement so previously made by and through its proper officers and in pursuance of the resolution of its said board of directors, made, executed and delivered to plaintiff in consideration of the facts and premises hereinbefore stated, the lease and agreement to sell said real

property as the same is fully set forth and described in said Exhibit A hereunto attached; that said agreement of sale and lease is still in full force and effect, and binding upon said corporation and all the parties hereto, and superior to said fraudulent deed of trust, all claims of the creditors of said bankrupt corporation, and the rights of said trustees to sell said Jersey Island Tract for any purpose whatsoever."

Certain difficulties arise from a consideration of these averments and of the said exhibit "A" attached to the complaint. It is averred, for instance, that the corporation agreed, in December, 1903, to execute this lease and option to buy for a period of seven and one-half years, and that thereafter the directors *refused* to make, execute or deliver said lease to plaintiff. In the very next paragraph it is positively alleged that the corporation, "in pursuance of said agreement so previously made by and through its proper officers and in pursuance of the resolution of its said board of directors, made, executed and delivered to plaintiff" the lease and agreement to sell said real property.

It further appears by express allegation that on the sixteenth day of December, 1903, this land was leased to plaintiff for the term of seven and one-half years, and when we turn to the said exhibit we find it recited therein that "the owner of the land shall and will upon the premises and conditions herein stated suffer and permit the occupier (John Loeffler) to enter on and occupy from the date hereof until the 31st day of December, A. D. 1904," the said land. The lessee was granted the privilege, however, of renewing the lease "for a further period of ten years at the expiration of this lease."

For the refusal of the directors to execute said lease the reason is assigned that it would take precedence of the said fraudulent trust deed. It appears that said refusal occurred in December, 1903, and it is alleged that afterward said fraudulent deed of trust was gotten up without plaintiff's knowledge of its existence, whereas the fact is, and it is shown by the complaint, that said deed was signed and acknowledged by plaintiff as the secretary of said corporation on the eleventh day of September, 1903, and recorded on the nineteenth day of the same month.

Again, plaintiff claims the said lease was in full force and effect when the second amended complaint was filed in 1908, but by its terms it expired on December 31, 1904. There is no allegation that the lease was renewed or that plaintiff exercised his option to continue the term or notified the lessor or defendants that he desired to exercise the privilege of extending the lease. There is no allegation that he paid or tendered the rent that was due under the terms of said lease. The complaint is silent as to any offer to purchase said property on the part of plaintiff as he was authorized to do by said lease.

Notwithstanding these omissions plaintiff seeks to recover damages for the conduct of defendants in withholding the said property from plaintiff for the period of three years from the "21st day of March, 1904, up to and about . . . day of May, 1905, when the said corporation was adjudged a bankrupt" and from the latter date till the beginning of this action.

It is clear that since the right to the possession of said property is grounded in said lease, plaintiff by appropriate allegations must bring himself within its terms. The action is essentially to recover damages for a failure specifically to perform an agreement to lease for a period of years, and it is elementary that one seeking such relief must show that he placed himself in such a position as to exact performance from the other party.

In *Shamp v. White*, 106 Cal. 220, [39 Pac. 537], it is said that "where the contract between the parties is for a renewal as distinguished from an extension of the lease, it is incumbent upon the lessee desiring to exercise his option for renewal to give notice of his election before the expiration of the original term."

So, if we regard that feature of the complaint relating to the option to purchase the land, the same condition is presented. There is no allegation of an offer to pay the consideration or the willingness to do so or that the contract was just and equitable.

Again, it appears that the corporation, in May, 1905, was adjudged an insolvent, and that the claims of plaintiff "against said corporation have been duly adjudicated and

filed with the clerk of the United States District Court in and for the Northern District of California.”

It has been held that “The acts of Congress relating to bankruptcy, so far as are concerned matters within their purview, are paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked in the administration of the affairs of an insolvent person or corporation, is essentially exclusive.” (*In re Watts*, 190 U. S. 1, [23 Sup. Ct. Rep. 718].)

The filing of a petition in bankruptcy is a *caveat* to all the world and in effect an attachment and injunction, and upon adjudication and qualification of the trustee, the bankrupt’s property is placed in the custody of the bankruptcy court, and title becomes vested in the trustee. (*Miller v. Nugent*, 184 U. S. 1, [22 Sup. Ct. Rep. 269].)

It would seem from the foregoing postulates, as urged by respondents, that when said corporation was adjudged a bankrupt the said United States district court immediately acquired full, complete, and exclusive jurisdiction of the corporation’s property and to determine all controversies between that company and third parties affecting the assets in its custody. It is true, though, that it further appears that after the adjudication of insolvency a composition was confirmed by said district court and the proceedings there closed. The effect of this was to revest in the bankrupt title to all the property, and it would seem to follow that plaintiff was at liberty to pursue his remedy against the company and its assets, unless its assets had been formally transferred, which is not alleged. Plaintiff pleads, indeed, the irregularity of said composition, but it is not contended that this irregularity appeared on the face of the proceedings. Respondents’ position, therefore, appears sound that this order of composition cannot be successfully assailed in this collateral way in a state court.

Desiring to have the order of composition set aside, appellant should have proceeded in said district court under the bankrupt act providing for the annulment of a composition once confirmed upon the ground of fraud where the fraud has come to the knowledge of a party since the confirmation, and where he moves within six months. (*In re Jersey Island Packing Co.*, 152 Fed. 839, 18 Am. Bankr. Rep. 412.) As

appears in the last-cited case, this was in fact the course pursued by appellant, but his application to have the composition in question set aside was denied by the said district court. In either aspect of the situation, therefore, whether the composition be valid or a nullity, it would seem that plaintiff cannot prevail in this proceeding.

But regarding only the transaction preceding the adjudication of insolvency and directing our attention to the allegations as to the disturbance by defendants of plaintiff's possession before the expiration of the year, for which the land was leased, we are involved in difficulty in determining what damage was suffered by plaintiff for the balance of the year, for the reason that this is not segregated from the whole loss alleged to have been incurred up to the time of said adjudication of insolvency, to wit, May, 1905. But if we could make the division there is an insuperable obstacle to recovery in the fact that prior to the execution of the lease, as we have already seen, a deed of trust was executed by said corporation of said property to certain of the defendants. If the property was conveyed to these grantees, according to the terms of said deed, in September, 1903, it would take precedence, of course, over the said lease executed by the grantor in December, 1903. It is true that plaintiff seeks to avoid said deed on the ground of fraud, but the action should have been brought within three years. (Code Civ. Proc., sec. 338.) Plaintiff seeks to avoid the bar of the statute by alleging that he did not discover the fraud of which he complains till some time in January, 1905, but the fraud consisted in the misrepresentation as to the contents of said deed. He must be deemed to have had actual notice of this, as the deed was signed by him, and, in addition, by the recordation of the deed he would have constructive notice thereof. The date of the filing of the original complaint does not, indeed, appear, but the intendments being in favor of the ruling of the court below, we must assume that the action was brought after the expiration of three years from the execution of said deed.

Again, it is not sufficient for the plaintiff to allege that he did not discover the fraud till a certain date. The rule is that while the cause of action to set aside an instrument on that ground is deemed not to have accrued until the dis-

covery of the facts constituting the fraud, it must also appear as well that the discovery could not have been made by the exercise of reasonable diligence. And plaintiff is presumed to have known all that reasonable diligence would have disclosed. (Code Civ. Proc., sec. 338, subd. 4; *Simpson v. Dalziel*, 135 Cal. 599, [67 Pac. 1080].)

The foregoing defects in the complaint and others which we deem it unnecessary to consider are covered by the demurrer of respondents which we think was properly sustained.

Appellant also complains because the court sustained the demurrer without leave to amend. This is a matter, however, within the discretion of the lower court and cannot be reviewed except for an abuse of that discretion. Plaintiff had made three attempts to present properly his cause of action. He had failed in each and the court was justified in concluding that any further effort would be equally futile. Indeed, the inference would be natural and reasonable that his failure arose from the want of facts rather than from lack of skill in stating them. Besides, it does not appear that plaintiff invoked the favor of the court to the end that another amended complaint might be filed.

The following quotations from the decisions of the supreme court are in harmony with this view: In *Martin v. Thompson*, 62 Cal. 622, it is said: "We cannot say the court abused its discretion in disallowing plaintiff's motion to file a second amended complaint. It does not appear from the transcript that any proposed amendment was served or presented, or that the notice of motion pointed out the precise amendment which plaintiff would ask leave to make or file."

In *Dukes v. Kellogg*, 127 Cal. 563, [60 Pac. 44], it is said: "The power of the court in allowing parties to an action to file amended pleadings is largely a matter of discretion. Here plaintiff had three opportunities to make a good complaint and failed. Three failures to make a good complaint fairly indicate that a fourth attempt would also be unavailing. The proposed amendment, or proposed amended pleading, was not tendered to the court for inspection, and we see nothing erroneous in the action of the court in refusing to allow further amendments. The failure to make a good

pleading probably arises in a lack of facts rather than in the fault of the pleader."

And the later expression, found in *Stewart v. Douglass*, 148 Cal. 512, [83 Pac. 699], is: "When a demurrer is sustained to a complaint it is within the discretion of the court either to allow an amended complaint to be filed or to give judgment forthwith in favor of the defendant. The appellate court will in every such case sustain the action of the court below, whatever course it may take, unless it is made to appear by the record that there has been an abuse of discretion. The plaintiff merely asked leave to file an amended complaint, and, so far as the record discloses, did not show that there were any allegations of fact omitted from the complaint to which the demurrer had been sustained which, if inserted therein, would in any respect change its legal effect, nor make any statement whatever of the grounds or reasons for making the application for leave to amend. There was clearly no abuse of discretion shown. (*Kleinclaus v. Dutard*, 147 Cal. 245, [81 Pac. 516].)"

In the case at bar there is nothing to show that appellant indicated in the court below any desire to file another amended complaint. We must assume that he made no such application, and hence it is out of the question to say that there was any abuse of discretion in sustaining the demurrer without leave to amend.

The judgment is affirmed.

Hart, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 13, 1910.

[Civ. No. 693. Second Appellate District.—April 15, 1910.]

COUNTY OF LOS ANGELES, Respondent, v. E. H. WINANS, CHARLES A. COLE et al., Appellants; MRS. EMMA MEANS and J. W. MEANS, Her Husband, et al., Respondents.

EMINENT DOMAIN—MONEY IN COURT—SETTLEMENT OF INTERESTS—PROTECTION OF UNBORN GRANDCHILDREN.—In this proceeding in eminent domain it is held that the court properly settled the rights of conflicting claimants to the property out of the money paid into court, and subjected the rights of the appellants to the rights of unborn grandchildren to an alternative contingent remainder in the property.

ID.—CONVEYANCE OF ESTATE FOR LIFE—REMAINDER TO HEIRS OF BODY—PURCHASE.—When property in this state is conveyed to a mother for life, with remainder to the heirs of her body, those interested in the remainder take by purchase and not by inheritance.

ID.—CONTINGENT FUTURE INTEREST.—Such remainder is a contingent interest, future in character, and the person to whom and the time of the happening of the event upon which it is limited to take effect were both uncertain at the time of its creation.

ID.—CONTINGENT REMAINDER NOT VESTED.—Since the uncertainties at the time of the creation of the contingent remainder continue to exist until the death of the life tenant, it did not and could not vest until her death, because she could have no "heirs of her body" prior to her decease. In the interval, all of her children may die, and the entire estate might vest wholly in her unborn grandchildren.

ID.—INTERESTS OF UNBORN GRANDCHILDREN NOT VOID FOR UNCERTAINTY, NOR MERE POSSIBILITIES.—The interests of unborn grandchildren in the contingent remainder are not void because of the improbability of the contingency on which they are limited to take effect; nor can such interests be regarded as mere possibilities, such as the expectancy of an heir apparent, as they do not depend upon the law of succession to determine whether or not they will take effect, and they cannot be defeated by the testamentary or other act of the ancestor.

ID.—CODE SECTION AS TO VESTED FUTURE INTERESTS INAPPLICABLE.—Section 694 of the Civil Code relating to a vested future interest "in a living person" has no application to a future contingent remainder in unborn grandchildren.

ID.—DISTINCTION BETWEEN VESTED AND CONTINGENT REMAINDERS.—Where the preceding estate is limited to depend on a certain event which must happen, and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may determine

prior to the expiration of the estate in remainder, the remainder is vested; but where the preceding estate is to determine upon an event which may never happen, or where the remainder is limited to a person not *in esse*, nor ascertained, or requires the concurrence of a dubious, uncertain event, independent of preceding estates, to give it a capacity of taking effect, the remainder is contingent.

Id.—ALTERNATIVE CONTINGENT REMAINDER.—The future contingent remainder in unborn grandchildren is an "alternative contingent remainder," under section 696 of the Civil Code. Such contingent remainder will vest in the unborn grandchildren whose father or mother, the child of the life tenant, fail to survive her decease. In that case, the grandchildren become the alternative substitutes for the deceased children of the life tenant, in taking the same vested fee in remainder which would otherwise have vested in her children. The taking of the unborn children is not a contingency dependent on a contingency, nor a subsequent contingency, but it is the same contingency which may happen, at the same time, in more than one way.

Id.—VIRTUAL REPRESENTATION OF UNBORN GRANDCHILDREN.—The conclusion that the rights of unborn grandchildren are contingent and not vested does not preclude the application to them of the principle of virtual representation, if the proceeding in which such representation was exercised was such as to justify it.

Id.—NECESSARY RULE OF REPRESENTATION OF UNBORN REMAINDERMEN.—PROTECTION IN PROCEEDS OF SALE.—When an estate in persons living is subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, not only for themselves, but also for the persons unborn, as a necessary rule. The rights of persons unborn are sufficiently cared for if, when the estate is sold under a valid judgment, the proceeds take its place, and are secured in some way for such persons.

Id.—VIRTUAL REPRESENTATION CONFINED TO MATTER OF NECESSITY.—The better rule is that virtual representation of unborn persons can be applied in support of a judgment only as a matter of necessity. The necessity of relying thereupon to acquire jurisdiction of the estate of unborn persons is apparent when the estate is sold and the proceeds take its place, and are so secured as to include the caring for and preserving the rights of the persons so represented.

Id.—VIRTUAL REPRESENTATION LIMITED BY GOOD FAITH.—The rule of virtual representation is confined to cases where the representation is in good faith, so that what is done by the representation is all that the represented person could do if personally present. The interests of representative and represented must be so identical

that the motive and inducement to protect and preserve may be assumed to be the same in each. If the sole purpose of the living person interested is to secure some advantage for himself, or to serve the convenience of one whose title is being quieted against the unborn remaindermen, virtual representation could not be permitted to exist.

ID.—PROTECTION OF PERSON REPRESENTED AGAINST FRAUD.—The protection of a person brought into court by representation which is fraudulent is to be found in his right when he becomes capable of suing in his own right to attack the decree on the ground of fraud and collusion in its procurement.

ID.—STATUTORY REPRESENTATION IN FORECLOSING LIENS OF STREET ASSESSMENTS.—The street improvement act of 1885, under which the land was sold under foreclosure of liens of street assessments, recognizes a constructive or virtual representation of unborn persons who have contingent rights in the property, by contemplating that the decree of foreclosure and sale shall subject the entire title to the property charged with the lien. All interests therein are constructively before the court when the service is made according to the statute.

ID.—FORECLOSURE PROCEEDING NOT IN REM—VIRTUAL REPRESENTATION NOT PRECLUDED.—The action to foreclose the lien of the street assessment is not *in rem*. If it were, there would be no need of any principle of representation. The fact that the judgment will not bind the entire world does not prevent the application of the doctrine of virtual or constructive representation contemplated by the statute.

ID.—ACQUISITION OF INTERESTS OF UNBORN GRANDCHILDREN PREVENTED—TRUST AGREEMENT FOR "HEIRS OF BODY."—The acquiring of jurisdiction of the interests of the unborn grandchildren in the action to foreclose the assessment did not effectually vest those interests in the purchasers at the sales, where respective agreements made by them with the life tenant and with each other were merged in a declaration of trust for the benefit of herself "and the heirs of her body."

ID.—ACTIONS TO QUIET TITLE—VIRTUAL REPRESENTATION PRECLUDED—PRIOR CONVEYANCE BY LIFE TENANT AND DAUGHTER.—Where before the commencement of actions to quiet title, the life tenant and her daughter had conveyed their interests to a predecessor of the plaintiff, their interests became hostile to that of other "heirs of her body," and neither she nor the daughter nor the plaintiff could represent the unborn grandchildren in actions to quiet title as against the other "heirs of her body," for the purpose of shutting off all other interests.

ID.—PARTIES TO ACTION TO QUIET TITLE—"ADVERSE CLAIMANTS."—Under section 738 of the Code of Civil Procedure, the action to determine adverse claims must make the "adverse claimants" par-

ties to the action, whether the service be personal or by publication, and where the virtual representation of unborn remaindermen is precluded, such unborn persons not parties to the action cannot be bound by the decree therein.

ID.—LEASE BY LIFE TENANT—BUILDING BY LESSEE—FORECLOSURE OF MECHANICS' LIENS—ABSENCE OF REPRESENTATION.—The life tenant having the possession of the property was authorized to lease the same so as to bind her interest, and where the lessee contracted to improve the property, the unborn grandchildren were not so connected with the lease as to be affected by the foreclosure of a mechanic's lien against the property. The life tenant could not ask a court of equity to preserve her interest at their expense.

ID.—GUARDIANSHIP OF MINOR BY HUSBAND—POWER LIMITED BY ORDER OF COURT.—Where the husband was appointed as guardian of the minor children by the probate court, he had no power to bind their interests by contract or by mechanics' liens, without an order of the court.

ID.—JUDGMENT FORECLOSING LIENS NOT INVOLVING REPRESENTATION—INTERESTS NOT IDENTICAL.—The judgment foreclosing the mechanics' liens could not affect the interests of unborn grandchildren where there is nothing in its language to comprehend them, and it does not appear that any interests foreclosed were identical with their interests so as to permit of virtual representation.

ID.—CONSENT OF MINORS TO DECREE NOT BINDING GRANDCHILDREN.—Where the minors were not held bound as owners of the property, but solely as having consented through their guardian to the decree, such consent could not bind the unborn grandchildren.

ID.—ACTION BY PURCHASER AT SALE TO QUIET TITLE—ABSENCE OF REPRESENTATION.—There being no transfer of the interests of the unborn grandchildren to the purchaser at the sale, in an action by him to quiet title against the husband and children, he having already acquired their interests in the property, he cannot represent the interests of the grandchildren therein.

ID.—COLLUSIVE SALE UNDER STREET SEWER ASSESSMENT—QUESTION OF FACT.—A sale under a street sewer assessment which the court found upon sufficient evidence was a collusive one to cure a defect in the title of one of the appellants, and initiate an adverse claim in favor of his wife, must be disregarded, the question being one of fact for the court.

APPEALS from a judgment of the Superior Court of Los Angeles County, and from orders denying a new trial. Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

Waldo M. York, and John M. York, for E. H. Winans, Appellant.

Waldo M. York, and Haas, Garrett & Dunnigan, for Chas. A. Cole, Appellant.

Haas, Garrett & Dunnigan, for Margaret M. B. Anderson, Appellant.

Bernard Potter, for T. F. Joyce, Appellant.

Smith & Smith, for S. C. Joyce, Appellant.

J. D. Fredericks, District Attorney, and Hartley Shaw, Chief Deputy, for Plaintiff, Respondent.

Valentine & Newby, for Means and Hendricks, Respondents.

Davis & Rush, for Wannop & Forbush, Respondents.

Mott & Dillon, for Henry J. Pauly & Company, Respondents.

TAGGART, J.—This is a proceeding in eminent domain brought by the county of Los Angeles to acquire lands upon which to construct a hall of records. Interlocutory decree and final order or judgment of condemnation were entered in favor of plaintiff. By the former the court, besides finding the value of the premises condemned, ascertained and adjudged the rights of the respective defendants in the property and apportioned among them the sum decreed to represent the value of the property condemned.

Separate appeals were taken by each of the appellants Winans, Cole, Anderson and Joyce from the final judgment, from the interlocutory judgment, and from the orders denying their respective motions to vacate and set aside certain findings, and their motions for a new trial. No objection is made to the value of the property fixed by the court, but its apportionment among the various defendants is questioned.

On June 27, 1881, J. E. Hollenbeck, who was the owner in fee simple of all the lands affected by this proceeding,

executed a deed conveying said lands to Mrs. Emma Means "for and during the term of her natural life and upon her death to the heirs of her body"; the *habendum* clause of said deed reading: "To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second party, for life, remainder to the heirs of her body." J. E. Hollenbeck died in the year 1885, leaving, as the sole executrix of his will and residuary devisee of his estate, his wife, Elizabeth Hollenbeck, who, after the regular distribution to her of said premises, and on the twenty-eighth day of June, 1887, made a deed of all her interest in said lands to said Emma Means. At the time of the making and delivery of the former deed there were living three children, heirs of the body of said Emma Means, to wit: Elfie O. Means, Claude E. Means and J. Worthington Means; two other children have since been born to her, as follows: Fairy A. Means (now Blee), about three years thereafter, and Juliet E. Means, born in the year 1890. The defendants Chester Kenneth Hendricks, Elizabeth Rosine Hendricks, James Bryan Hendricks, Merle Raymond Hendricks, Esther Georgia Hendricks and Clarence Donald Hendricks are grandchildren of said Emma Means and children of the defendant Elfie O. Hendricks (formerly Means); and the defendants Claude Edward Means and Dorothy Matele Means are also grandchildren of said Emma Means, being children of said defendant Claude E. Means.

The defendants who are appellants here claim to have succeeded to the title to various portions of said premises, together including the entire property, by sales thereof made in various proceedings to foreclose street assessments, mechanics' liens, etc., had in the superior court of Los Angeles county, and by virtue of certain decrees quieting their titles so acquired, made by the same court. The portions claimed by the appellants are respectively designated as follows: That of Winans as lot 4; that of Cole as lot 5; and that of Joyce as lot 6, all of the "Court House Block" in the city of Los Angeles. Lot 4 comprises the east half of the condemned lands; lot 5 the southwest quarter, and lot 6 the northwest quarter thereof.

The trial court found, in effect, as to each of the said appellants Winans, Cole and T. F. Joyce that he had acquired

all the right, estate and interest of Emma Means as life tenant and as successor to the estate of J. E. Hollenbeck, deceased, and of her children as remaindermen in and to the portion of the condemned property claimed by said appellant, but that he did not acquire the rights, interest or estate of the grandchildren of Emma Means in said premises. The finding in this respect as to the Hendricks grandchildren and lot 4 being as follows: "The defendants Hendricks, children of defendant Elfie O. Hendricks, have an interest in said lot four (4) contingent upon the death of their mother, Elfie O. Hendricks, during the lifetime of the said Mrs. Emma Means, and also contingent upon their surviving said Mrs. Emma Means; and upon the happening of said contingencies they, or the survivor or survivors of them, will be the owners of an interest and estate in fee in said lot four by virtue of said deed of J. E. Hollenbeck as heirs of the body of said Mrs. Emma Means, the extent of which cannot now be determined." Similar findings were made as to the other lots, and also as to all the lots, in favor of the other grandchildren, Claude Edward Means and Dorothy Matele Means, children of Claude E. Means. The appellant Anderson's interest is found to be that of mortgagee of the interest of appellant Cole in lot 5.

The appellants attack these findings (other than the last) and the conclusions of law drawn therefrom and the directions of the court as to the disposition of the funds in accordance therewith, and contend: (1) That the remainder created by the deed of J. E. Hollenbeck vested at once in the children of Emma Means, under the provisions of section 694 of the Civil Code; (2) That whether such remainder be regarded as vested or contingent, service of process upon and the appearance in the various proceedings by Mrs. Means, her children with the guardian of the latter, by application of the principle of virtual representation, operated to bind the interests of the grandchildren yet unborn; and (3) that certain of the proceedings were *in rem* and jurisdiction of the interests of the grandchildren was obtained by following the statutory method of bringing the property into court.

The proceedings in which it is claimed jurisdiction of the interests of the unborn grandchildren was thus acquired so as to estop or bar them from now claiming any interest in

the sum found to be the value of the property are as follows: In support of the titles of Cole and Winans (which may be considered together), the following judgment-rolls: (a) The rolls in actions Nos. 14,109 and 10,983 to foreclose street assessment liens against certain portions of said property, brought against Mrs. Emma R. Means, her husband J. W. Means, the defendants named herein who are children of Emma R. Means, and W. E. Rogers, who is the lessee of Mrs. Means, and also of the children under a proceeding in equity (No. 8,616) by their mother and guardian to obtain consent to the execution of a lease in their name; (b) that in an action to quiet title, No. 18,501, by Abbott, the successor in title of the purchasers at the sales made pursuant to the decrees in the above-mentioned foreclosure proceedings, against Mrs. Means, her husband and children; (c) that in an action, No. 21,002, brought by Winans against Abbott, trustee, etc., Mrs. Means, husband and children, to foreclose a mortgage on the portions of the premises now claimed by Winans and Cole; (d) that in an action to quiet title to the same premises, No. 24,146, by Gosch, the successor in title to the purchaser (McCollum) at the commissioner's sale made in execution of the decree in action No. 21,002, against four of the Means children, J. Worthington Means, Claude E. Means, Fairy A. Means and Juliet E. Means, minors; (e) and that in an action by the same plaintiff to quiet title (No. 28,196) against Mrs. Means, her husband and five children. Incidental to and explanatory of these proceedings, it is also necessary to consider the effect of the proceeding No. 8,616 above referred to, and of probate proceeding No. 5,874; of the lease of Mrs. Means and children to W. E. Rogers, and the deeds, mortgages and other instruments through which the parties to these respective actions and proceedings acquired the rights upon which such actions were based. These are as follows: Sheriff's deed in No. 14,109 to A. J. Mead, and deed of latter to R. W. Abbott; sheriff's deed in No. 10,983 to Stella M. Johnson; her deed to Charles A. Cole and the deed of the latter to R. W. Abbott; a declaration of trust by R. W. Abbott for the benefit of Emma Means and the heirs of her body; mortgage of Abbott, trustee, to Winans; a deed by Mrs. Means to Charles A. Cole; deed by Mrs.

Means and her daughter Elfie O. to M. McCollum; deed by McCollum et ux. to C. H. Gosch, and the deed of Emma R. Means, Elfie O. Means and J. W. Means to C. H. Gosch.

In support of the contention of appellants Joyce (T. F. and S. A.) that the interests of the grandchildren in lot 6 were acquired by them, the following additional proceedings and matters are relied upon: The judgment-rolls in (f) a consolidated action to foreclose certain mechanics' liens on the building constructed by Rogers, lessee, under the lease above mentioned, No. 12,444, against Rogers, Mrs. Means, her husband and children; and (g) in an action to quiet title, No. 19,205, brought by Horace Hiller, who purchased the property at the sale under the decree foreclosing the mechanics' liens, against Mrs. Means, her husband individually and as guardian of the children, the five children and others whose names are not material here.

Under the code of this state the remainder granted to the heirs of the body of Emma Means by the deed of J. E. Hollenbeck was an interest which the remaindermen took by purchase, and not by inheritance (Civ. Code, sec. 779). It was a contingent interest, since it was future in character, and the person in whom, and the time of the happening of the event upon which it was limited to take effect, were both uncertain at the time of its creation. These uncertainties both continued to exist until after the various proceedings were had upon which appellants base their respective titles (sec. 695). It did not and could not become vested until the death of the life tenant, since she could have no "heirs" until her decease. In the interval all of her children might die, leaving the entire estate to the second generation, or the grandchildren. The interests of the latter are not void because of the improbability of the contingency on which they are limited to take effect (sec. 697). Neither can their interests be regarded as mere possibilities, such as the expectancy of an heir apparent (sec. 700), as they do not depend upon the law of succession to determine whether or not they will take effect, and they cannot be defeated by the testamentary or other act of the ancestor. It is also apparent that section 694 has no application here. That section is, in effect, the enactment into a statute of the rule laid down in *Fearne on Contingent Remainders and Executory Devises*:

“The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.” (Butler’s 6th ed., p. 216.) This declaration should be read in connection with the language of Fearne which immediately follows it, to wit: “In short, upon a careful attention to this subject we shall find, that wherever the preceding estate is limited, so as to determine on an event which must certainly happen; and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, wherever the preceding estate is limited so as to determine only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not *in esse* or not ascertained; or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent.” (Page 217.)

In *Williamson v. Williamson*, 57 Ky. 329, 368, it was said of the rule distinguishing a contingent from a vested remainder, first above quoted from Fearne: “This principle, however general and universal it may be, has no application in a case like this, where the event which renders the possession vacant also resolves the contingency upon which the limitation depends, and makes that certain which was before uncertain. The possession becomes vacant by the death of the ancestor, and by the same event the persons who properly sustain the character of ‘heirs’ are ascertained and rendered certain. This rule, therefore, cannot operate as a test in a case like this, where the estate in remainder is given to the heirs of the same person who is devisee for life.”

The remainder which we are considering is a future interest which will vest in those grandchildren of Mrs. Means whose father or mother, child of Mrs. Means, fails to survive the grandmother, and is an alternative contingent remainder under section 696 of the Civil Code. In some of its characteristics it resembles the “contingent remainder,

or alternative remainder in fee, with a double aspect," of the common law. Such estates usually arose where a remainder was limited to the issue of some person named and, upon failure of such issue before the death of the life tenant, to some other person in the alternative. Of the estates so created it is said they are both contingent fees limited merely as substitutes or alternatives one for the other, and not to interfere, but so that only one shall take effect; for instance, the fee of the grandchild in the case at bar being substituted in place of the fee of its father or mother if the latter should fail of effect by the grandmother surviving such father or mother. (Pingrey on Real Property, sec. 1008.) The one remainder is a substitute for, and not subsequent to, the other. Neither is, by its terms, to wait until the other shall have once taken effect and afterward been determined. (Washburn on Real Property, 6th ed., sec. 1575; Tiedeman on Real Property, sec. 415; Fearne on Contingent Remainders, 373; *Waddell v. Rattew*, 5 Rawle, 234.) They are not remainders expectant, the one to take effect after the other, but are contemporaneous. (*Luddington v. Kime*, 1 Ld. Raym. 203, [91 Eng. Reprint, 1035].) The taking by the unborn remainderman is not a contingency dependent upon a contingency, but the same contingency which may happen several ways. (*Plunket v. Holmes*, T. Raym. 28, [83 Eng. Reprint, 17].)

The conclusion that the interests in remainder of the defendant grandchildren were and are contingent instead of vested does not preclude the application to them of the principle of virtual representation, if the proceedings in which such representation was exercised were such as to otherwise justify it. The rule as to virtual representation is stated broadly by the supreme court of the United States in *Miller v. Texas & Pacific R. R. Co.*, 132 U. S. 672, [10 Sup. Ct. Rep. 206], by recognizing the holding of Lord Redesdale in *Giffard v. Hort*, 1 Schoale & L. 386, as follows: "Where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before

the court *before he has issue*, the contingent remaindermen are barred. Courts of equity have determined on grounds of high expediency that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life." So, also, the New York court in *Kent v. Church of St. Michael*, 136 N. Y. 10, [32 Am. St. Rep. 693, 32 N. E. 704], uses the following language: "Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand, not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons." The rule is declared in Story's Equity Pleadings, section 144, and its limitations considered in the sections following. (See, also, *Finch v. Finch*, 2 Ves. Sr. 491, [28 Eng. Reprint, 316]; *Reynoldson v. Perkins*, Amb. 564, [27 Eng. Reprint, 362]; *Cockburn v. Thompson*, 16 Ves. Jr. 321, [33 Eng. Reprint, 1007]; *Harrison v. Wallton*, 95 Va. 721, [64 Am. St. Rep. 830, 30 S. E. 372, 41 L. R. A. 703]; *Hale v. Hale*, 146 Ill. 227, [33 N. E. 858, 867]; *McCampbell v. Mason*, 151 Ill. 500, [38 N. E. 675]; *Miller v. Foster*, 76 Tex. 479, [13 S. W. 531]; *Hermann v. Parsons*, 117 Ky. 239, [78 S. W. 125]; *Dunham v. Doremus*, 55 N. J. Eq. 511, [37 Atl. 62]; *Gavin v. Curtin*, 171 Ill. 640, [49 N. E. 523]; *Loring v. Hildreth*, 170 Mass. 328, [64 Am. St. Rep. 301, 49 N. E. 652].)

The rule and its reason are declared in *Sweet v. Parker*, 22 N. J. Eq. 455, as follows: "Many exceptions exist to the general rule that in equity all must be parties who have an interest in the object of the suit. The reason or principle of such exceptions is stated as follows in Calvert on Parties, section 2, page 20: 'If they are required to be parties merely as the owners and protectors of a certain *interest*, then the proceedings may take place with an equal prospect of justice if that interest receives an effective protection from others. It

is the *interest* which the court is considering, and the owner merely as the guardian of that interest; if, then, some other persons are present, who, with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be so required, and the court may, without putting any right in jeopardy, take its usual course and make a complete decree.' '' The rule is made applicable to representation of persons living, as well as those unborn, as in the case of an association whose members are numerous. (*Cockburn v. Thompson*, 16 Ves. Jr. 321, 326, [33 Eng. Reprint, 1007].) This principle is carried into our statutes by the provisions of section 388 of the Code of Civil Procedure, where the joint property of all may be bound by serving the summons upon one or more of a larger number of associates. Other statutory proceedings based thereon might be named. The doctrine is said by some of the cases to be applied only where the law regards the interest of the representative so identical with that of the person represented that motives of self-interest will induce the person acting as the representative to defend the property as his own. Other cases following the suggestion in *Calvert on Parties* urge in support of the rule the motives of affection where the representative of the unborn child is its parent; all, however, holding that all persons in being capable of appearing who are interested must be brought into court. The protection of a person whose property is brought into court by such representation is to be found in his right to attack the decree on the ground of fraud or collusion in its procurement. In the absence of such attack, the decree is final and conclusive as to the status of the property. (*Baylor v. Dejarrette*, 13 Gratt. 152; *Faulkner v. Davis*, 18 Gratt. 651, 690, [98 Am. Dec. 698].) These two cases have been more recently approved in the case of *Harrison v. Wallton*, 95 Va. 721, [64 Am. St. Rep. 830, 30 S. E. 372]. (See, also, *Ruggles v. Tyson*, 104 Wis. 500, [79 N. W. 766, 81 N. W. 367]; *Mayall v. Mayall*, 63 Minn. 511, [65 N. W. 942]; *Mathews v. Lightner*, 85 Minn. 333, [89 Am. St. Rep. 558, 88 N. W. 992]; *Gray v. Smith*, 76 Fed. 525, 532; *Arndt v. Griggs*, 134 U. S. 321, [10 Sup. Ct. Rep. 557].)

The application of the principle as here contended for is not a common one, and no decision by a court of this state so applying it has been called to our attention. The convenient use, which it served in extricating involved real estate titles at common law and in common-law jurisdiction, does not appeal with equal force to conditions existing under the code, although it is true, as said by some of the cases, that it is in accord with the trend of modern law toward making real property as readily transferable as is consistent with fair dealing and protection against fraud. That it tends to furnish some certain and convenient method of determining all unsettled questions respecting such titles, and that the well-being of every community requires the latter (*Arndt v. Griggs*, 134 U. S. 321, [10 Sup. Ct. Rep. 557]), is not alone sufficient to justify its indiscriminate adoption. So well have these matters been covered by statute that its application has become not only unusual, but generally unnecessary.

The better reasoned of the later cases hold that it can be relied upon in support of a judgment only as a matter of necessity and never merely as a matter of convenience. The form of the action is not controlling, but is, of course, to be considered in connection with the circumstances of the case. The necessity for relying upon some such principle to acquire jurisdiction of the interest in real property of persons unborn is apparent, "where the estate is sold under a regular and valid judgment, and the proceeds of sale take its place and are secured in some way for such persons" (*Kent v. Church of St. Michael*, 136 N. Y. 10, [32 Am. St. Rep. 693, 32 N. E. 704]), since this includes the caring for and preserving of the rights of the persons so represented; it is also readily apparent where the purpose of the suit in which such persons are said to be so represented is for the administration of a trust estate by a court of equity so as to protect the interests of the unborn, as well as those who are in being, against the danger of destruction by tax and other liens which affect the entire title (*Ruggles v. Tyson*, 104 Wis. 500, [79 N. W. 766, 81 N. W. 367]); or in a case such as the one at bar where the property is necessary for a public use and the court can by decree protect the interests of the party said to be so represented. So where a trust is created

without a power of sale and it is necessary for the preservation of the trust estate that it be sold, this principle is properly invoked to acquire jurisdiction of the persons not in being. (*Mayall v. Mayall*, 63 Minn. 511, [65 N. W. 942].) It is more difficult, however, to follow the reasoning underlying these decisions into those cases in which it has been held that, where a mortgagor after making the mortgage conveys the mortgaged property upon such conditions as to create an interest therein in unborn persons, a foreclosure suit brought by the mortgagee against all interested persons living, or all the parties that could be brought before the court, enables a court of equity to enter a decree barring the equity of redemption of the persons not *in esse*. (*Sweet v. Parker*, 22 N. J. Eq. 455; *Nodine v. Greenfield*, 7 Paige, 544, [34 Am. Dec. 363].) In these cases, however, the interest of the unborn person, who is so represented, is such only as his grantor had in the property at the time the deed was made, that is, whatever would be left after the debt secured by the mortgage had been paid. So, also, in cases in which the judgment has been adverse, thus absorbing the entire estate of both the living and those not *in esse*, it is not easy, at first sight, to see how it can be said that anything is being done to preserve or protect the interest of the unborn. In such cases, as in those first mentioned, the living remainderman is called upon to protect such an estate as he and the other party has, and if the result of the decree of the court be to declare there is no estate, or that such as there is should be applied to the payment of the liens which exist against it, the representative has done all that the represented could have done had he been present. If the sole purpose of the appearance of a living remainderman in an action were to secure some advantage to himself, or merely to serve the convenience of the party whose title was being quieted against the unborn remaindermen, virtual representation could not be presumed to exist, and any judgment obtained by virtue of such pretended representation could be set aside on the ground of fraud or collusion when the unborn remainderman became capable of suing in his own right. Where, however, he has the same interests to preserve in the property that the unborn person would have if he were present, and his acts in connection therewith are such that, from the advantage to

the person not *in esse*, it can be assumed the latter will adopt them, the acts of the living remainderman in protecting the property against attack may be said to come within the reason of the rule. The interests of representative and represented must, however, be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each.

Considering the effect of this doctrine upon the various judgment-rolls and documents hereinabove mentioned, we are of opinion that the proceedings under the street improvement act of 1885, as the statute read at the time when the foreclosures in actions Nos. 10,983 and 14,109 were decreed, were intended to subject to the lien created by the law the entire title of the property affected thereby. As was said in *Gillis v. Cleveland*, 87 Cal. 217, [25 Pac. 351]: "Thus it appears that the expense of the improvement is a charge upon the property benefited, and not a charge against the owner personally, in furtherance of this end, the identity of the lot assessed, and not the person who may be the owner, is made the essential requirement of the statute; the first must be specifically described, while the latter may be designated as 'unknown,' as in the present case. Nowhere in the statute does any intention appear to charge the owner personally." But section 12 of the act also provides that the contractor may sue "the owner of the land, lots or portions of lots"; that the suit must be brought in the superior court within whose jurisdiction the work was done, service in such actions to be had in such manner as is prescribed in the codes and laws of this state; and that, "The court in which said suit shall be commenced shall have power to adjudge and decree a lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts." (Stats. 1889, p. 168.) It was also said in *Page v. Chase*, 145 Cal. 578, 583, [79 Pac. 278]: "In this state the legislature has authorized its enforcement by means of a suit in equity against the 'owner' of the land; and in section 16 of the Street Improvement Act (Stats. 1885, p. 159), the 'owner' is defined to be, for the purposes of that act, 'the person owning the fee, or in whom appears the legal title to the land by deeds duly recorded in the county recorder's office of the county.' There

is no provision that the land shall be made the defendant in such action, or that service of process shall be made upon it. . . . It would not be contended that (because the assessment was made to an unknown owner), the contractor could select any person he might choose as the defendant in his action and bind the land by the judgment therein, as against its actual owner, as defined in section 16." The quotation from section 16 by the court in this opinion was no doubt sufficient for the purposes of that case, but it omits a portion of the definition important here, that is, the provision which makes the executor administrator or guardian of the "owner," and persons in possession under claim, or exercising acts of ownership over the same also "owners" for the purpose of the law. The statute itself thus recognizes a constructive or virtual representation as sufficient to give the court jurisdiction of the property in the equitable action to foreclose the lien provided for, even though the proceeding be held not to be one *in rem*, for the reason that the *res* is not made a defendant.

If the view expressed in *Page v. Chase*, 145 Cal. 578, 583, [79 Pac. 278], that a judgment for the sale of the property in such a proceeding will not bind the entire world, or affect the interests in the property of any owner not made a party defendant to the action, be accepted, this does not prevent the application of the rule of virtual representation. If the proceeding were strictly *in rem*, there would be no necessity to invoke any principle of representation except the one that the property in court represents all its owners and claimants. It is not necessary that a suit in equity be strictly *in rem* to subject the entire property to the payment of the debt. All interests in the property are constructively or virtually before the court when the service is made in accordance with the statute, whether this be upon the person or the thing. A decree in equity may be made effective as to all persons interested in the property to the value thereof in the same manner that the law makes a judgment against an estate a judgment *in personam* against the administrator, which is enforceable only to the extent or value of the estate held by him. Decrees in equity are frequently made effective in this way and the property is as effectually bound as if it were attached or seized or made the defendant in the

action. (*Richards v. Blaisdell*, 12 Cal. App. 101, [106 Pac. 732]; *Stacy v. Thrasher*, 6 How. 44, 61; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, [5 Sup. Ct. Rep. 135].)

The acquiring of jurisdiction of the interests of the grandchildren by these proceedings did not effectually vest these interests in the purchasers at the sales made under the respective decrees, because of the respective agreements made by them with Mrs. Means and with each other, and which became merged in and were succeeded by the declaration of trust by R. W. Abbott for the benefit of Emma R. Means and the heirs of her body. None of the subsequent proceedings or steps taken released the successors in title of Abbott from the trust obligation to hold for the benefit of the unborn remaindermen. The action to quiet title by Abbott (No. 18,501) resulted in the making of the declaration of trust by him for the benefit of Mrs. Means and "the heirs of her body." The mortgage of Abbott to Winans was executed by the former under and by virtue of a contract with Mrs. Means and was to secure obligations primarily imposed upon her as life tenant of the property. The most favorable view for appellants that can be taken of this transaction is that the amount named in the mortgage was the sum found necessary to prevent the sale of the entire property under the street foreclosure proceedings, and, the transaction being for the preservation of their estate, the interests of the unborn remaindermen were bound by the decree in the action (No. 21,002) to foreclose the mortgage. While of opinion that the case before us is to be distinguished from those cited by appellants in this connection (*Sweet v. Parker*, 22 N. J. Eq. 455; *Nodine v. Greenfield*, 7 Paige, 544, [34 Am. Dec. 363], and English cases), we regard this as unnecessary, because, as in the case of the street assessments, the purchaser at the sale (M. McCollum) entered into an agreement whereby he became only the legal holder of the title with the equitable rights of the remaindermen in the property fully acknowledged. He, like the previous purchasers of the property, was bound to know that he was dealing with the life tenant, who might be protecting her own holding at the expense of the remaindermen, and yet whose efforts to protect the property, and all agreements made by her having this effect, must redound to the advantage of the remaindermen.

In the first action to quiet title by Gosch (No. 24,146), Mrs. Means and her daughter Elfie O. Means were not made parties defendant, they having prior to that time conveyed the property to McCollum by a grant deed, and Gosch having succeeded to McCollum's interests therein. So also, as above stated, subsequent to the conveyance by McCollum to Gosch and prior to the commencement of the second action to quiet title (No. 28,196), Mrs. Means, her husband and her daughter made a quitclaim deed of said premises to Gosch. By the making of the grant deed the interests of Mrs. Means and her daughter Elfie became hostile to that of the other "heirs of her body." Their legal obligation to protect the title of their grantee rendered them incompetent to represent the others in the manner in which they had theretofore done. It could no longer be said that there was an identity of interest and motive between them and the other contingent remaindermen. Their appearance no longer operated to give jurisdiction of the others to the court. The plaintiff had succeeded to the interests of Mrs. Means and her daughter in the property, and being himself hostile he could not appear for the contingent remaindermen, although he had acquired the interests of one of them. The first action being by the vendee of the life tenant for the purpose of destroying the remainder, and the second by the successor of the life tenant and one of the contingent remaindermen for the same purpose, the doctrine of virtual representation could not be applied. It is apparent, then, that in neither of these actions was jurisdiction of the grandchildren acquired upon this theory. The special reasons stated distinguish this case from those cited bearing upon the application of the doctrine to actions to quiet title.

Without applying the principle of virtual representation, we know of no theory upon which the court can be said to have acquired jurisdiction of the interests of the grandchildren, who were not parties thereto, in these actions to quiet title. The proceeding authorized by section 738 of the Code of Civil Procedure may be broader in some respects than the suit in equity called by the same name, but it does not authorize the adjudication of the right, claim, interest, or title of anyone not before the court. In terms it says: "An action may be brought by any person *against another* who claims

an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim," etc. Where the service of summons is made constructively under the code, the proceeding becomes to a certain extent one *in rem*, but the decree entered in such a case cannot adjudge the rights of any person not included in the constructive service, any more than it can do so where the persons named in the summons have been personally served within the state. In case of either personal or constructive service, only the interests of the persons served and of those whom they expressly or virtually represent are affected by the decree. The only proceeding purely *in rem* given by the statutes of this state for the determination of the rights in real property of persons whose interests are unknown, to which our attention has been called, is that provided by sections 749, 750 and 751 of the Code of Civil Procedure.

An examination of proceeding No. 8616, relied upon by appellant Joyce, is important on this appeal only for the purpose of determining whether the interests of the unborn contingent remaindermen were so connected with the lease of Rogers as to be affected by the judgment foreclosing the mechanic's lien in suit No. 12,444. The duty of paying the taxes and street assessments (actions Nos. 10,983 and 14,109 above), by reason of the nonpayment of which the property was about to be lost, rested primarily upon the life tenant, Mrs. Means. She was entitled to the possession and might lease the property at her pleasure for any term, subject only to the limitations of her own estate, but there were no grounds upon which she could ask a court of equity to preserve her estate at the expense of that of the remaindermen. So far as she was concerned, this was the only purpose served by proceeding No. 8616. As the application of Mrs. Emma Means, life tenant, it failed to set forth any cause for relief, and in her capacity of mother Mrs. Means was not authorized to sue, as her husband J. W. Means was the regularly appointed general guardian of the children who were living. The husband was the appointee of the probate court (No. 5874), and if the authority or consent of any court were necessary in order that he might make a lease of his wards' property, application should have been made to the court to which he owed his appointment. He could not go into a court of equity

and procure this authority. No power is given to the guardian to subject an interest in the real estate of his ward to the maintenance or support of the latter (Code Civ. Proc., secs. 1768, 1770), or to change the form of such an investment (sec. 1792) without an order of court. There was no special procedure for this purpose provided by the code at the time application No. 8616 was made to the superior court; nevertheless, we are of opinion that proceeding No. 8616 did not affect the interests of the minors because not addressed to the probate side of the court in No. 5874. That the guardian cannot bind the property of his ward by a contract without an order of court is well settled in this state. (*Guy v. Du Uprey*, 16 Cal. 195, [76 Am. Dec. 518]; *Morse v. Hinckley*, 124 Cal. 154, [56 Pac. 896].) As he cannot make such a contract, so an attempt on his part to do this cannot result in giving to the party with whom he has contracted the right to a lien for labor done or materials furnished under the contract. (*Fish v. McCarthy*, 96 Cal. 484, [31 Am. St. Rep. 237, 31 Pac. 529]; *San Francisco Paving Co. v. Fairfield*, 134 Cal. 220, 224, [66 Pac. 255].) If the guardian could not by his direct act impose a lien upon the interests of his ward, it could not be done indirectly by the lessee of the life tenant. If the question whether the minor children of Mrs. Means were required to give the notice provided by section 1192, or have the lien foreclosed in action No. 12,444 imposed upon their interests in the property, had to be here decided, we should be inclined to accept the view that they were not. (James on Mechanics' Liens, sec. 105, p. 114.) The attack upon the sufficiency of the judgment in that action, however, is a collateral one, and it appears from the findings therein that the court found that these minors were the owners of the property and "that all of the material furnished and labor performed by any or all of the plaintiffs was furnished and performed with the knowledge and consent of the owners of the real estate described in the complaints." The guardianship of the father is also found, and in support of the judgment we are bound to presume this finding of knowledge and consent meant such consent as would sustain the decree. The complaint sufficiently alleges such ownership and consent, and the authority of the guard-

ian to consent, to sustain the findings mentioned. (*Collins v. O'Laverty*, 136 Cal. 31, [68 Pac. 327].)

The language of the judgment, however, does not comprehend by name or description among those whose claims to the property and equity of redemption are barred and foreclosed any of the grandchildren contingent remaindermen. Neither do we think, under the principle of virtual representation hereinabove applied in the proceedings to foreclose street assessment liens, they were brought within the jurisdiction of the court in proceeding No. 12,444. It does not appear upon the face of the judgment-roll in that action that the interests of the persons appearing and contesting the lien were identical with that of the unborn remaindermen. Indeed, it appears from the findings in the case, including those last above considered, that the liens foreclosed were created by the act of the lessee of the life tenant under a contract with her, and that her interest alone was chargeable. The minors who were before the court were not held bound because they were owners who failed to give the notice under section 1192, but because of their consent to the judgment against them. They could not bind the grandchildren in this way. Accepting the rule laid down in the decision of Justice Matthews of the United States supreme court in *Heidritter v. Elizabeth Oil-Cloth Co.*, 122 U. S. 294, 301, [5 Sup. Ct. Rep. 135], that the proceeding to foreclose a mechanic's lien is "in its essential nature" *in rem*, we find nothing therein to warrant us in holding that any transfer of the title of the unborn remaindermen was made to Hiller by virtue of the deed to him as purchaser at the sale made in execution of the judgment. This was not a proceeding whereby the property alone is made defendant in the action and the world foreclosed. The owner must be made a party to such an action if his property is to be made chargeable with the claim for which the lien is given.

When action No. 19,205 to quiet title was brought by Hiller against Mrs. Means, her husband and children, and others, he had already acquired the interests of Mrs. Means and her children in the property the title of which he sought to quiet, and these persons could not be brought into court solely to represent the interests of the grandchildren. The issue raised by the answer of the children who appeared in the action

related to a charge of fraud upon the part of their father and mother in consenting to the former judgment (No. 12,444) on their behalf, but upon this issue the court found against them. This was not an issue affecting the interests of the grandchildren, and it cannot be said that the living remaindermen represented the interests of the unborn in presenting the matter.

The claim of title of S. A. Joyce to lot 6, the same property claimed by T. F. Joyce, is based upon a sale pursuant to the foreclosure of a street sewer assessment and a deed to her from the board of public works of the city of Los Angeles, dated July 1, 1908. This sale the court found to be a collusive effort of T. F. Joyce to cure the defect in his title by refusing to meet his obligations as successor of the life tenant and as a coremainderman, and to thus initiate an adverse holding in the lot by causing the same to be brought in by his wife S. A. Joyce. The question here was one of fact, and we are of opinion that there is evidence to sustain the finding of the court.

We do not think it necessary to consider the question of which appeal properly presents the matter to the court. Suffice it that the cause is before us on its merits in either view.

The findings of the court holding that the contingent interests of the grandchildren of Mrs. Means acquired by the Hollenbeck deed did not pass to appellants find support in the evidence, and the disposition of the proceeds of the judgment made in accordance therewith properly apply the law, and, therefore, the judgment and orders appealed from are affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 13, 1910.

[Civ. No. 697. Second Appellate District.—April 15, 1910.]

COUNTY OF LOS ANGELES, Respondent, v. E. H. WINANS, CHAS. A. COLE et al., Respondents; Mrs. EMMA MEANS et al., Appellants.

CONVEYANCE OF ESTATE FOR LIFE—REMAINDER TO HEIRS OF BODY—PURCHASE—INHERITANCE—INCONSISTENT CLAIMS.—Where a conveyance was made to a mother for life, with remainder to the "heirs of her body," the proper contention that such heirs took by purchase, under section 779 of the Civil Code, is inconsistent with the improper contention that the living children have the expectancy of "heirs apparent."

Id.—RIGHTS OF LIVING CHILDREN.—The rights of the remaindermen who are living children are not mere possibilities under section 700 of the Civil Code, but are future estates in fee to vest in such of them as may survive their mother.

Id.—CHARACTERISTICS OF FUTURE INTERESTS.—Future interest: pass by succession, will and transfer, in the same manner as present interests, and they are not rendered void because of the improbability of the contingency upon which they are limited to take effect.

Id.—CONSTRUCTION OF WORDS "HEIRS OF HER BODY."—To construe the words "heirs of her body" to mean "in the capacity of heirs" would be to restore the rule in Shelley's Case, and repeal by construction the express terms of section 779 of the Civil Code. For all the purposes connected with the transactions involved in this case those words will be construed as words of description and identity, and not of capacity.

Id.—FORECLOSURE OF STREET ASSESSMENT LIENS—SUBJECTION OF ENTIRE PROPERTY—TRUST AGREEMENT.—The foreclosure of street assessment liens under the statute in force had the effect to subject the entire property and all interests therein to sale to satisfy the liens; the acquisition of full title thereunder being only prevented by a trust agreement between the purchasers and the appellants.

Id.—ACTIONS TO QUIET TITLE—APPELLANTS CONCLUDED BY DECREES.—*Held*, that in the actions to quiet title brought against the appellants as parties defendant, their rights were concluded by the decrees rendered therein against them.

Id.—ASSIGNMENTS OF INTERESTS BY APPELLANTS—CLAIM OF MORTGAGES CONCLUDED BY FINDING.—It is held the claim of appellants that the assignments of their interests were intended as mortgages is concluded against them by the finding in an action to quiet title against them.

ID.—TRUST BY OPERATION OF LAW—ADVERSE HOLDING BY TRUSTEE—RIGHT OF TRUSTEE TO QUIET TITLE—BENEFICIARIES CONCLUDED.—

When a trust arises solely by operation of law, the holding by the trustee is adverse from its inception; and the trustee is not thereby precluded from maintaining an action to quiet his legal title against the beneficiaries. Such beneficiaries may set up their equitable rights; and where all of them appeared as defendants, they are concluded by the findings against them upon all issues joined in their behalf.

ID.—TITLE UNDER FORECLOSURE OF MECHANICS' LIENS—DECREE QUIETING TITLE—APPELLANTS ESTOPPED.—*Held*, that as to the title acquired under foreclosure of mechanics' liens, if appellants are not precluded from a collateral attack upon the decree of foreclosure, they are estopped by the findings and decree against them brought by the purchaser of the title to quiet his title against them.**ID.—EMINENT DOMAIN—SUPPORT OF FINDING—DESCRIPTION OF PROPERTY—CLAIM OF "GORE"—MISASSUMPTION OF FACT BY SURVEYOR.—**

Upon appeal from a judgment in eminent domain settling interests in the property out of the fund in court, it is held that a finding that the property rights of appellants passed to other parties is sustained as to the description thereof by the evidence, and that the testimony of a surveyor that a small "gore" was not lost to appellants is based upon a misassumption of fact as to the description.

ID.—CONSISTENCY OF FINDINGS—"CONTINGENT" AND "VESTED" INTERESTS.—

Where the findings construed as a whole clearly show that any remainder under the deed to the life tenant was contingent and could not be ascertained until her death, a finding that a respondent "is the owner of the estate in remainder" in a lot "that was vested in" the children appellants by virtue of the deed, is not to be construed as inconsistent with the other findings, where the context clearly shows that the words "vested in" are used as the equivalent of the words "acquired by," so that such finding imports that respondent is the owner of the estate in remainder acquired by such children by virtue of the deed.

ID.—EVIDENCE—ABSENCE OF PREJUDICIAL ERROR.—

It is held that there is no prejudicial error in the admission of evidence.

ID.—REASONS OF TRIAL COURT FOR DECISION—REVIEW UPON APPEAL.—

An appellate court is not bound by the reasons given by the trial court for its decision. It is the judicial action of the trial court, as distinguished from its judicial reason, which appellate courts are called upon to review, and if the former be correct, the appellate court will not concern itself about the latter.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial.
Walter Bordwell, Judge.

The facts are stated in the opinion of the court, and more fully in case No. 693, *ante*, p. 234, referred to in the opinion.

Valentine & Newby, for Appellants.

J. D. Fredericks, District Attorney, and Hartley Shaw, Chief Deputy, for County of Los Angeles, Respondent.

Waldo M. York, and J. M. York, for E. H. Winans, Respondent.

Waldo M. York, and Haas, Garrett & Dunnigan, for Chas. A. Cole, Respondent.

Haas, Garrett & Dunnigan, for Margaret M. B. Anderson, Respondent.

Bernard Potter, for T. F. Joyce, Respondent.

Smith & Smith, for S. A. Joyce, Respondent.

Mott & Dillon, for Henry J. Pauly, and Henry J. Pauly & Co., Respondents.

Davis & Rush, for Wannop & Forbush, Respondents.

TAGGART, J.—This is an appeal by the defendants Emma R. Means and her five children from the judgment of the superior court directing the payment to the defendants Winans, Cole and Joyce of the amounts awarded the latter as successors in title to the interests of said appellants in the condemned property mentioned in the companion appeal to this (No. 693, *ante*, p. 234), the opinion in which is filed herewith, and which opinion is referred to for a statement of the facts of the case. An appeal is also taken from an order denying their motion for a new trial.

It is urged in support of these appeals that the series of transactions, proceedings and actions enumerated in the opinion in No. 693, *ante*, p. 234, failed to transfer the interests of Mrs. Means and her five children to the other defendants above named, or to any of them. The insufficiency of the evidence

to justify the various finding upon which the portions of the decree so adjudicating is rested is specified as error in support of the motion for a new trial. It is also contended that neither the conclusions of law nor the interlocutory decree is sustained by the findings, that the findings are contradictory and that the court erred in admitting in evidence the several judgment-rolls and documents upon which the claims of defendants Winans, Cole and Joyce are based.

Appellants sustain their main contention on this appeal upon the view that the children of Mrs. Means take the interests acquired by them through the Hollenbeck deed as purchasers (Civ. Code, sec. 779); but when the right of transfer of their interests is presented section 700 of the same code is invoked and various cases cited in which the expectancy of an "heir apparent" is considered. These two positions are inconsistent. The rights of the remaindermen under the Hollenbeck deed, who are living, and are children of Mrs. Emma Means, are not mere possibilities, such as are covered by the provisions of section 700, but estates in fee to vest in the future in such of them as survive their mother. Future interests pass by succession, will and transfer in the same manner as present interests (sec. 699), and they are not rendered void merely because of the improbability of the contingency upon which they are limited to take effect (sec. 697). To construe the words "heirs of her body" to mean "in the capacity of heirs" would be to restore the rule in Shelley's Case and repeal by construction the express provisions of section 779. For all purposes connected with the transactions herein reviewed, these words will be considered as words of description and identity, and not of capacity, such being the effect of the section last named (779).

As said in the opinion in No. 693, the proceedings to foreclose the street assessment liens (Nos. 14,109 and 10,983), while not *in rem* in the sense that the *res* is brought into court as a defendant, are, nevertheless, substantially such, since by the "suit in equity" against the persons whom the statute designates the "owners," the entire property becomes subject to sale to pay such liens. (*Page v. Chase*, 145 Cal. 582, [79 Pac. 278].) If it be assumed, however, that jurisdiction of appellants was acquired by the court in these cases, so that the decree was effective, the agreements made with

the purchasers at the respective sales by Mrs. Means served to continue their equitable interests in the premises which was admitted, in the Abbott declaration of trust in their behalf. Again, if we regard the foreclosure of the Abbott mortgage as not barring the equity of redemption of appellants, and the agreement of Mrs. Means with McCollum, although made in her own name, as having been made for the benefit of her children, the actions to quiet title, particularly by No. 28,196, were sufficient to conclude all the appellants.

The claim now made by Mrs. Means and her daughter Elfie O. Hendricks (then Means), that their deeds to McCollum and Gosch, respectively, were intended as mortgages, was submitted to the court as an issue by the pleadings in action No. 28,196, and they are concluded by the finding of the court made thereon against them. So, also, upon collateral attack the finding made by the court in the same action that "neither of these defendants (Emma R. Means, J. W. Means, her husband, and Elfie O. Means, Claude E. Means, J. Worthington Means, Fairy A. Means and Juliet E. Means) have now any right, title, or interest in or to any of the property described in the plaintiff's complaint," is conclusive against all the appellants. Appellants' view that the attitude of plaintiff in the action (Gosch) is not adverse to appellants cannot be sustained. The trust relation between the latter and Gosch, if there was such a relation, was not created by writing and there was no showing of an express trust. Where the trust arises by operation of law it is said the beneficiaries have a right to proceed to enforce their claim to the trust property immediately that the title to the trust property vests in the involuntary or constructive trustee, and that the statute of limitations begins to run against their cause of action from that date. (*Norton v. Bassett*, 154 Cal. 411, 419, [129 Am. St. Rep. 162, 97 Pac. 894].) While the statute of limitations would not be operative as to minor defendants, the principle announced by the case declares the adverse character of the holding.

Gosch was not precluded from bringing an action to quiet title against the appellant because of the alleged trust relation. He was the holder of the legal title and the equitable character of the claim of the defendants in the action did not prevent the court from entering up a valid decree de-

clarating the interests of the respective parties, legal and equitable, in the premises. There was no place for the application of the rule that the holder of an equitable title cannot enforce his equities against the holder of the legal title. So the contention of appellants that the action cannot be maintained against the children because their contingent remainder is a mere expectancy finds full answer in *Barnett v. Barnett*, 104 Cal. 298, 301, [37 Pac. 1049]. (See, also, Civ. Code, sec. 699; *In re Walkerly*, 108 Cal. 627, 648, [49 Am. St. Rep. 97, 41 Pac. 772].) We find nothing in the record in the case (to which alone we must look) to sustain the point made by appellants that the judgment in action No. 28,196 was entered by consent without authority. The complaint was in the ordinary form used in such actions; service of summons was regularly made upon the minor defendants by serving them and their father personally. All the defendants appeared, a guardian *ad litem* being appointed for the minors, a general denial was entered and the special interests of the defendants pleaded, showing their equitable rights and the existence of the agreement with McCollum. On these issues the court found in favor of plaintiff, and the defendants are concluded by the findings so made.

With respect to the title of T. F. Joyce, if the finding in No. 12,444, that the material for which the lien was claimed was furnished with the knowledge and consent of the owners of the real estate, were not sufficient to conclude appellants upon a collateral attack, they are, nevertheless, estopped by the judgment in No. 19,205. In this action the complaint to quiet title was in the usual form and the answer of defendants (appellants here) set up all the equities claimed by them in their brief upon this appeal, and in the case of the children alleged collusion between plaintiff (Hiller) and their mother, Emma R. Means, in the procurement of the judgment in the foreclosure of the liens of the materialmen and mechanics in action No. 12,444. On all of these issues the trial court found in favor of plaintiff. While Hiller was acting as trustee for the materialmen and mechanics who were plaintiffs in No. 12,444, there is no evidence of any express trust relation between him and appellants and no bar on this ground to his bringing the action to quiet his title.

The conveyance of Gosch and wife to Winans and Cole, respectively, conveyed to them the interests acquired by Gosch in lots 4 and 5; and that of Hiller to Joyce the interest Hiller acquired in lot 6.

In all that has been heretofore said, both in this opinion and that filed in appeal No. 693, it has been assumed that no question of description was involved, and that the respective holdings of defendants Winans, Cole and T. F. Joyce, to wit, lots 4, 5 and 6 of the courthouse block in the city of Los Angeles, taken together, covered the entire Means property. Appellants, however, contend that such is not the case and that the findings of the court in this regard are not sustained by the evidence in the case. It is claimed that it appears from the evidence of the witness Rowan, and the diagram introduced in connection therewith, that there remains a triangular piece of land thirty-three and seventy-one hundredths feet wide on the northerly boundary of the property and running to a point at the southerly boundary which is not affected by the various proceedings, conveyances, etc., which are hereinabove considered, the title to which remains in the defendants Means, Blee and Hendricks. The deduction of the surveyor witness that there is such a "gore" remaining is made upon the assumption that the descriptions in all these various instruments call for lines running parallel to New High and Broadway (Fort) streets, instead of at right angles to the side lines running from one of these streets to the other. As the fact is not as assumed, it is not necessary to enter into a calculation to determine the exact effect of the calls as made, the number of square feet one way or the other being so small and of so little value.

Other alleged errors presented relate to matters specified as "decisions against law," and "errors of law occurring at the trial." Under the first it is urged that findings 3 and 4 are not consistent in this, that it is found by the court in finding 3 that appellant Winans has acquired and owns the interest of the life tenant, the reversionary interest of the grantor, and the interests of the five children (naming them) in lot 4; and "That the persons who will take said property at the termination of said life estate and the proportions in which they will take the same cannot now be ascertained"; while finding 4 is, that Winans is the owner

of the estate in remainder in lot 4 "that was *vested* in" the five children by virtue of the Hollenbeck deed, and "will upon the death of said Emma Means, take the interest and estate in fee in said lot 4 that would under said deed of J. E. Hollenbeck go to those of the above-named children of Mrs. Emma Means who shall survive her." It is contended that the use of the word "vested" in the last-mentioned finding is a holding that the interest in remainder of the Means children is a "vested" one, which is inconsistent with the view that such remainder is contingent implied by the language quoted from finding number 3. It is apparent from the context that the words "vested in" are not used in the finding in a comparative sense as distinguishing a vested from a contingent estate, but rather as the equivalent of the words "acquired by." This is apparent from that part of the finding which is above quoted. That is to say, the fourth finding means only that Winans is the owner of the estate in remainder "acquired by" the five children of Mrs. Means by virtue of the Hollenbeck deed. So read it is consistent with the other findings, and tends to support the conclusions of law drawn from those findings by the trial court. The same errors are alleged with respect to the findings relating to the titles of Cole and Joyce and these objections may be answered in the same way.

The errors of law specified relate to the admission of the various judgment-rolls and documents the effect of which has been hereinabove considered. For the reasons assigned the papers in the proceeding No. 8616, and the lease to Rogers made pursuant thereto, do not directly support the title of Winans and Cole, but it is apparent that their admission in evidence could not have prejudiced the rights of the appellants Means, Hendricks and Blee. The proceeding mentioned was begun to procure the consent of a court of equity upon behalf of the Means children to the making of the lease to Rogers, but was not effective for that purpose. The court, however, found in action No. 12,444 that the consent of these minors was given and the judgment-roll in No. 12,444 established this fact conclusively against collateral attack. The effect of No. 8616 therefore as evidence supporting the Joyce title need not be considered, as this title is established without it. An appellate court is not bound by the reasons given

by the trial court for its decision. It is the judicial action of the trial court as distinguished from its judicial reason which appellate courts are called upon to review, and if the former be correct the appellate court will not concern itself about the latter. It is not material for the purpose of this appeal, then, whether the trial court relied upon the proceeding No. 12,444 or No. 19,205 in sustaining the Joyce title.

The judgment-roll in the latter action was properly admitted. The objection to its admissibility on the ground that the interests of the children, as heirs at law, were not litigated or decided therein, cannot be sustained. Their interests as heirs at law were not involved. Their rights in the property were those of purchasers and their respective interests personal and not representative. The term "heirs of the body" of Emma Means did not make her "heirs at law" in that capacity parties to the title, but the persons who were described by the words "heirs of her body" acquired an interest as individuals.

There was no finding of adverse possession, and the judgment was sufficiently sustained by the other findings; hence, it follows that if the evidence of the payment of taxes and holding of possession by Winans, Cole and Joyce was immaterial so far as the children were concerned, the latter were not prejudiced by its admission, even though it were error to admit it.

Objections were made to the introduction in evidence of the various judgment-rolls which have been mentioned, but these objections are not specifically urged except as they are presented by the arguments which have hereinabove been considered in connection with the effect of such rolls upon the titles of the children of Mrs. Means.

In accordance with the foregoing views, the interlocutory decree and orders appealed from are affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 13, 1910.

[Civ. No. 770. First Appellate District.—April 15, 1910.]

In the Matter of the Estate of JOSEPH GOETZ, Deceased.
LOUIS ALBERT GOETZ et al., Appellants, v. EMMA
BOEHM et al., Respondents.

WILL—CONSTRUCTION—MONEY LEGACIES—EXCLUSION OF SPECIFIC DEVISEES AND LEGATEES—PRO RATA SHARE IN SURPLUS MONEY.—Under a will distributing \$180,000 in money legacies, and expressly excluding any share therein by specific devisees and legatees of all the testator's land, pictures, jewelry and furniture, declaring that he made "no money bequests" to them, as the real estate "so bequeathed to them in equal shares is ample and sufficient"; but in a final bequest of any possible "surplus money that may be left, the will states that it" shall be divided equally among "the legatees herein mentioned, share and share alike," the specific devisees and legatees are entitled to share *pro rata* in such surplus.

ID.—INTENTION OF TESTATOR DRAFTING OWN WILL—UNTECHNICAL TERMS—POSSIBLE REDUCTION OF LEGACIES—SURPLUS UNANTICIPATED—CLOSER TIES.—Where the testator was of foreign birth with limited knowledge of technical terms in English, and drew his own will, it seems evident from its terms that he thought the bequests of \$180,000 might more than exhaust his money, since he provided for a reduction of legacies if the money was found insufficient, and did not anticipate a surplus which he provided for out of abundance of caution, using the words "if there should be some surplus of money" it shall be divided as expressed, and since those to whom the land and all equipments were bequeathed were in closer ties to him than the money legatees, it seems evident from all the language used that it was merely his intention to exclude them from a share in the specified money legacies, and not from a share in any part of the surplus.

ID.—INTERPRETATION OF REPEATED WORDS IN WILL.—Words occurring more than once in a will are presumed to be used in the same sense; and the allusion to "money bequests" in the clause limiting the bequests of land are evidently used in the same sense as that of the preceding "money bequests" referred to.

ID.—DOUBTFUL INTENTION TO QUALIFY RESIDUARY CLAUSE—CLEAR AND DISTINCT BEQUEST OF SURPLUS—CODE PROVISION.—It being at least doubtful whether the testator intended by the qualification of the land bequest to limit or affect the residuary clause disposing specifically of any possible surplus, it is sufficient to sustain the specific residuary clause that section 1322 of the Civil Code provides that "a clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not

equally clear and distinct, or by inference or argument from other parts of the will or by an inaccurate recital of or reference to its contents in another part of the will."

APPEAL from an order of the Superior Court of San Francisco, denying a petition for partial distribution of the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

P. A. Bergerot, A. P. Dessouslavy, and Jellett & Meyerstein, for Appellants.

Louis Bartlett, for Emma Boehm et al., Respondents.

Loewy & Gutsch, for Camille Goetz et al., Respondents.

KERRIGAN, J.—This is an appeal from an order denying an application for a decree of partial distribution.

The controversy calls for a construction of clauses 7 and 13 of the will of Joseph Goetz, deceased.

The first clause of the will contains the names of the executors and vests them with certain powers.

The second clause reads: "I make the following bequest: all of which money bequest and to be paid in gold coin of the United States of America."

In the third and fourth clauses the testator bequeathed to six nephews and a niece—other than the appellants—and to a grandniece, sums of money aggregating \$180,000.

By the fifth clause he devised to the appellants, three nephews and a niece, all his real estate.

In the sixth clause among other gifts he bequeathed to the appellants certain pictures, some jewelry and his household furniture, all of substantial value.

The seventh clause reads as follows: "I make no money bequests to my nephews and niece which are mentioned in paragraph Fifth of my will as the real estate owned by me at the time of my death so bequeathed to them in equal shares is ample and sufficient."

The only other clause in the will that need be quoted is clause 13, which reads as follows: "If there should be some surplus of money from the sales of my personal properties

consisting of mortgages notes; and shares of stocks and banks account so mentioned shall be divided equally among the legatees herein mentioned in this will share and share alike."

From the findings of the court it appears that the debts of the estate have all been paid; and that after liquidating certain unpaid legacies, and making an adequate allowance for the remaining expenses of administration, the surplus of the personal estate referred to in the thirteenth clause will not be less than \$60,000, and there is no reason why a partial distribution of the estate should not be made to the appellants unless it was the intention of the testator, by clause seventh, to exclude them from participating in what he termed the "surplus" of his estate.

The appellants are not only devisees, but admittedly by virtue of the terms of the sixth clause of the will they are also legatees, and as such, under clause 13 standing alone, they are beneficiaries.

This brings us to a consideration of the real question in the case, namely, Does the seventh clause of the will limit or affect the thirteenth clause thereof? The testator drew his own will. He was a foreigner by birth, whose command of the English language, and especially of technical legal terms, was limited; and for this reason among others it is somewhat difficult to determine the testator's intentions. We think, however, that it was not his desire that clause seventh should affect or restrict the thirteenth clause. From a reading of the will it would seem that while the testator out of excess of caution provided for the disposition of a possible surplus of his estate, he hardly expected that there would be any surplus, but that the legacies of \$180,000 in clauses 3 and 4 would exhaust his entire personal estate. In clause 10 he directed that a portion of the rents of the real property devised should constitute a part of his estate. In clause 11 he directed that if there should not be sufficient money to pay the legacies mentioned in clause 3, said legacies should be proportionately reduced. Clause 13 itself reads: "If there should be some surplus of money," etc., it "shall be divided equally among my legatees," which uncertain form of expression, when compared with the certain and positive language in which other provisions of the will are stated, would also indicate that he considered the surplus of his personalty

to be at least a doubtful quantity. Accordingly, and as the tie was closer and stronger between appellants and the testator than between him and respondents, and as he nowhere in his will stated the value of his whole estate or his real property, it is more reasonable to assume that, remembering the superior claims of appellants on his bounty, he wrote clause 7 to explain why he had made no definite money bequests to appellants, rather than that he intended thereby to exclude them from receiving any part of the possible residue of his estate.

Further light is thrown on the purpose of clause 7 by a consideration of the structural arrangement of the will. In clauses 3, 4, 5 and 6 the testator disposed of \$180,000 in cash, all his real estate and his pictures, jewelry and household furniture, which clauses cover what we may term the primary disposition of his property. Immediately following these is clause 7, in which he says, "I make no money bequests to my nephews and niece mentioned in paragraph 5 of my will," as the real estate "bequeathed to them is ample and sufficient." Six clauses farther along he says, however, "If there should be some surplus of money," etc., it "shall be divided equally among the legatees . . . mentioned in this will share and share alike." The seventh clause following immediately, as it does, the disposition, as he apparently supposed, of all of his property, was intended, we believe, not as a limitation or restriction of clause 13, but as a reason why he made no specific money bequests to the appellants.

Again, in clause 2 the testator, in referring to the legacies in clauses 3 and 4 of named sums of money, spoke of them as "money bequests"; and there is some force in the suggestion that in employing the same expression in clause 7 he meant thereby to say that he made no bequests to appellants of specific sums of money because the real estate given them was ample and sufficient. In 30 American and English Encyclopedia of Law, second edition, page 671, it is said: "Repetition of words. Words occurring more than once in a will are presumed to be used always in the same sense when the context does not show a contrary intention, or when the words are not applied to different subjects."

In *Pringle v. Wilson*, 156 Cal. 313, [104 Pac. 316], it is said: "It is a familiar rule of construction that other things

being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another." (See, also, Beal on Legal Interpretation, 2d ed., p. 558.)

It will be unnecessary, however, to consider this point further, for whatever the testator meant by clause 7, it cannot be successfully denied that it is at least doubtful whether that clause was intended to limit or affect clause 13; and section 1322 of the Civil Code specifically provides that a clear and distinct bequest in a will, such as is clause 13, cannot be restricted or qualified by another provision therein which is indefinite or doubtful; and it must be held therefore that appellants are residuary legatees under clause 13, and entitled to partial distribution of the personal estate of the testator. The last-mentioned section reads as follows: "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." (See, also, *Estate of Upham*, 127 Cal. 90, [59 Pac. 315]; *Estate of Marti*, 132 Cal. 666, [61 Pac. 964, 64 Pac. 1070]; *Estate of Granniss*, 142 Cal. 1, [75 Pac. 324]; *Williams v. Williams*, 73 Cal. 99, [14 Pac. 394].)

The order is reversed, and the court is directed to enter an order granting the application for partial distribution.

Hall, J., and Cooper, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 13, 1910.

[Civ. No. 796. Second Appellate District.—April 18, 1910.]

**T. H. DUDLEY, Petitioner, v. SUPERIOR COURT, ETC.,
IN AND FOR THE COUNTY OF LOS ANGELES,
Respondent.**

ELECTION CONTEST—JURISDICTION OF SUPERIOR COURT.—The jurisdiction of the superior court to hear and determine election contests is included within the jurisdiction conferred upon said court by section 5 of article VI of the constitution of all such special cases and proceedings as are not otherwise provided for.

Id.—PREMATURE ORDER AND CITATION—KNOWLEDGE OF PROCEEDING.—An order for a citation made on the date of the filing of the contest is unauthorized and may be disregarded, except in so far as it is record evidence of knowledge of the proceeding, and a citation issued thereon can have no legal effect.

Id.—NOTICE BY CLERK TO COURT OF FILING CONTEST—PURPOSE.—The provision of the statute requiring the clerk to notify the court of the filing of the contest is a means provided for calling the pendency of the contest to the attention of the court, in order that the court may make a timely order calling a special session for the hearing of such action.

Id.—NOTICE NOT REQUIRED TO BE WRITTEN.—The statute does not require that the clerk's notification to the court of the filing of the contest must of necessity be in writing.

Id.—COURT'S KNOWLEDGE—NOTICE NOT REQUIRED.—It affirmatively appearing that the court had actual notice of the filing of the contest on the day of its date, it was not necessary for the clerk to give a formal notification in order that the court might be apprised of the pendency of the proceeding. The prior knowledge was still in the breast of the court on the day when it made its order calling a special session to hear the contest.

Id.—CONSTRUCTION OF STATUTE—TIME FOR ORDER AFTER NOTIFICATION—WORD "THEREUPON"—REASONABLE TIME.—The statute directing that the court, after notification by the clerk, "shall thereupon order a special session," does not by the use of the word "thereupon" import "immediately," but only "within a reasonable time."

Id.—LAPSE OF SIX DAYS AFTER EXPIRATION OF THIRTY DAYS FROM STATEMENT NOT UNREASONABLE—JURISDICTION OF SUBJECT MATTER.—The lapse of six days after the expiration of thirty days from the filing of the contesting statement was not unreasonable, and did not deprive the court of jurisdiction of the subject matter, under the general law, to make the order fixing the date for the commencement of the session for hearing the contest, where it appears that such date was within twenty days from the time

when the court was first authorized to act, and exceeded ten days, the minimum of time designated in the statute.

ID.—JURISDICTION OF PERSON OF CONTESTEE—DEMURRER TO STATEMENT—GENERAL APPEARANCE—DEFECTS IN CITATION WAIVED.—Where the contestee upon the date when the order was made calling the special session, appeared and interposed a general demurrer to the statement of the contestant, such demurrer had the effect of a general appearance, giving the court full jurisdiction over the person of the contestee; and had the effect to waive all neglect of the clerk to issue the citation in proper form or the service thereof, which became immaterial upon the question of personal jurisdiction.

ID.—CONTEST FOR OFFICE OF MAYOR—MUNICIPAL AFFAIRS—ELECTION UNDER FREEHOLDERS' CHARTER—GENERAL LAWS APPLICABLE.—Although the election of a mayor under a freeholders' charter is a municipal affair, and if a contest were provided thereunder it would be a municipal affair, yet such charters are subject to general laws not in conflict therewith, and in the absence of a charter provision for such contest, the general laws of the state are applicable thereto.

ID.—JURISDICTION OF CONTEST—PROHIBITION NOT ALLOWED.—It appearing that the superior court had jurisdiction both of the subject matter of the contest and of the person of the parties before it, a writ of prohibition cannot be allowed regardless of any question as to the adequacy of the remedy by appeal.

APPLICATION for writ of prohibition to the Superior Court of Los Angeles County. C. D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Stephens & Stephens, and Tanner, Taft & Odell, for Petitioner.

Ben S. Hunter, and C. C. Towner, for Respondent.

THE COURT.—It is made to appear from the petition filed herein that Santa Monica is a city organized and existing under a freeholders' charter; that on the seventh day of December, 1909, an election was held in said city at which petitioner and one Roy Jones were rival candidates for the office of mayor; that on the thirteenth day of December, 1909, the city council, pursuant to law, canvassed the returns of said election and declared petitioner elected to the office of mayor of said city for the full term of two years; that there-

after said Dudley qualified as such mayor and is now acting as such; that thereafter, on the eighth day of January, 1910, Roy Jones filed his complaint or statement against petitioner in the superior court, in which he alleged, among other things, that the board of election of said city wrongfully, inadvertently and unlawfully counted, tallied and returned votes for said Dudley for the office of mayor which were not cast for him and which should not have been counted for him, and that some thereof so tallied and returned for Dudley were cast for said Jones; that certain illegal votes were cast at said election and counted for said Dudley; that if all of said illegal votes so given to said Dudley were taken from him, the same would reduce his vote below the number of legal votes given to said Jones; and he prayed the court for a recount and that he be declared elected mayor of said city of Santa Monica. That upon the filing of said statement or complaint the same was presented to C. D. Wilbur, one of the judges of the superior court of Los Angeles county, who upon reading the same ordered a citation to be issued by the clerk directed to said Dudley, ordering him to appear before said judge on the nineteenth day of January, 1910, to show cause, if any, why the relief prayed for in the said complaint should not be granted. Thereupon, on the same date, the clerk issued a citation as by said judge directed. That on the nineteenth day of January, 1910, being the time fixed in said citation for the appearance of Dudley, he appeared in said proceeding specially and for the sole purpose of objecting to the jurisdiction of the court, and moved to quash and set aside the citation upon the ground that the same was issued prematurely and not in accordance with the provisions of section 1118 of the Code of Civil Procedure, upon the hearing of which motion the same was denied. Upon the same day of the denial of said motion Dudley filed his demurrer to the complaint and statement filed by said Jones, both general and challenging the jurisdiction of the court over the subject matter of the action, which demurrer was, upon the nineteenth day of January, overruled. Dudley by counsel thereupon objected to the court making any order for a special session for the trial of said cause, for the reasons that the clerk had not given the notice as required by section 1118a of the Code of Civil Procedure to the court, or

at all, that the time for giving such notice had expired, and because the time within which the court could make an order had expired, which objections the court overruled, and on said nineteenth day of January, made its order calling a special session of the court to be held on February 1, 1910, for a recounting of the ballots cast at the election held in Santa Monica for the office of mayor, and defendant was ordered to appear on that date, and which said last-mentioned order was ordered to be entered as one superseding the prior minute order made directing citation. It is alleged that the clerk did not, within five days after the end of the time allowed for filing statements of contest, notify the superior court of the filing of any statement, and that by reason thereof the court lost jurisdiction over the subject matter; that the trial of said cause will entail great expense upon said Dudley, and he, therefore, prays for a writ prohibiting the court from further proceeding in the matter in connection with a recount of said ballots.

The jurisdiction of the superior court to hear and determine election contests is included within the jurisdiction conferred upon such superior court by section 5, article VI, of the constitution, said proceeding being special and the jurisdiction in relation to which is not otherwise provided for by statute. The clerk of the county is *ex officio* clerk of the superior court, and a paper filed with such clerk having reference to a special court proceeding is filed with him as *ex officio* clerk of such court.

The general law of the state regarding the contests of elections provides, by section 1115 of the Code of Civil Procedure, that when an elector contests the right of any person declared elected to such office he must file with the county clerk a written statement setting forth specifically the facts constituting the grounds of contest which are enumerated in the section, which statement must be verified and filed within thirty days after the declaration of the result of the election by the body canvassing the returns thereof. By section 1118a of the Code of Civil Procedure, it is provided: "Within five days after the end of the time allowed for filing such statements the county clerk must notify the superior court of the county or city and county of all statements filed. The court shall thereupon order a special session to be held, on

some day to be named by it, not less than ten nor more than twenty days from the date of such order, at which session the ballots shall be opened and a recount taken, in the presence of all the parties," etc. By section 1119 of the Code of Civil Procedure it is provided: "The clerk shall thereupon issue a citation for the person, whose right to the office is contested, to appear at the time and place specified in the order, which citation must be delivered to the sheriff, and served either upon the party in person, or, if he cannot be found, by leaving a copy thereof at the house where he last resided, at least five days before the time so specified."

It is petitioner's contention that, by reason of the failure of the clerk to notify the court as provided by section 1118a of the filing of the statement, and by reason of the court making its order for a citation before the lapse of time for filing statements, the order of January 19th, entered by the court calling a special session, was without jurisdiction, the time having elapsed within which, it is claimed, under the statute such order could be made.

It may be conceded that the order of the court entered on January 8th directing the citation in the manner and form set forth in such order, except in so far as it is record evidence of a knowledge of the pendency of the proceeding, may be disregarded, as no such order is contemplated by the statute, and the citation issued by the clerk did not purport to convey to the contestee either the substance or effect of any order which by law the court was authorized to make and enter. The provision of the statute requiring the clerk to notify the court of the filing of the contest is a means provided by the statute for calling the pendency of the contest to the attention of the court, in order that the court may make a timely order calling a special session for the hearing of such action. There is nothing in the statute indicating that the notification to the court of the filing of such proceeding must of necessity be in writing. It affirmatively appearing that the court had actual notice on January 8th of the filing of the contest, it was not necessary for the clerk to give a formal notification in order that the court might be apprised of the pendency of the proceeding. The court having knowledge of the pendency of the proceeding before the date at which it could act, and the record disclosing that

such knowledge was still within the breast of the court on the 19th of January, it is fair to assume that such knowledge remained with the court during the interim, which includes the thirty-first day after the filing of the statement of contest. Upon this date the court, having knowledge of the filing of the contest, is required by the statute to make its order calling a special session for the hearing of the same. This order, calling the special session for February 1st, the court made on the nineteenth day of January, six days after the expiration of the thirty days from the filing of the statement. It will be observed that the date named for the commencement of the special session was within twenty days from the date when, as we have said, the court, having notice of the contest, was authorized to act, and the time so fixed was more than ten days thereafter. The statute directs the court upon receipt of the notification to thereupon make its order. This word "thereupon" does not of necessity mean immediately. (*California Academy of Sciences v. Fletcher*, 99 Cal. 210, [33 Pac. 855].) As said by the supreme court of this state in *Porphyry Pav. Co. v. Ancker*, 104 Cal. 342, [37 Pac. 1050], where the court was considering a section of the street law in which it is provided that the superintendent of streets shall thereupon cause certain posting to be done, the word refers to the order of time in which the act shall be done and is not a mandatory regulation requiring immediate performance; "that it should follow within a reasonable time is the most that should be claimed." It cannot be said that a delay of six days in making the order was an unreasonable time, when we consider that, in so far as the public is concerned, the time fixed for the special session was within the limit of twenty days from the time when the court was first authorized to act and exceeded the ten days, the minimum of time designated. We are of opinion, then, that the superior court had jurisdiction of the subject matter pertaining to the election contest, if the same is subject to general law.

It further appears by the petition that upon the same date when the order was made calling the special session the petitioner, defendant in said contest, filed a general demurrer to the statement of Jones, the contestant. Under section 1014 of the Code of Civil Procedure, the effect of such demurrer was the entering of an appearance to the proceeding. The

parties then being in court, and petitioner herein having entered an appearance to the proceeding, the neglect of the clerk to issue the citation in proper form, or the service thereof, is of no materiality in determining the question of personal jurisdiction.

It is further insisted by petitioner that the matter of the contest of an election held in a municipality acting under a freeholders' charter is a municipal affair, and that under the constitution (art. XI, sec. 6), which provides that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws," the general law is subordinate to the regulations of the city in respect of such matters. The only provision of the charter of the city of Santa Monica claimed by petitioner to have reference to an election contest is found in section 30: "The council shall also have full power to pass ordinances upon any other subject of municipal control, or to carry into effect any other powers of the municipality." It may be conceded that the election and classification of the officers of a charter city, as well as contests arising from such election, are municipal affairs, but that the charter shall supersede the general law in relation thereto it is necessary that the charter itself should contain appropriate provision relative to such affairs. Mr. Justice Harrison, in *Fragley v. Phelan*, 126 Cal. 395, [58 Pac. 923], says: "If, however, the charter of a city, whether given to it by the legislature prior to the constitution of 1879, or framed by a board of freeholders, contains no provision in reference to subjects which might have been included therein, that city or its inhabitants is not thereby freed from legislative control. . . . A city cannot claim to be exempt from general laws relating to municipal affairs if there is no provision relating to such affairs in the charter under which it is acting, whether such charter is one framed by itself or was given to it by the legislature." This last proposition is cited and followed in *Dinan v. Superior Court*, 6 Cal. App. 223, [91 Pac. 806].

We find nothing in the charter of Santa Monica which undertakes to deal with the subject of the contest of municipal elections, nor any ordinance of the city based upon the authority of the charter under which any mode or proceeding

relative to such contests is sought to be established. There is, therefore, nothing in such charter in conflict with general law. The averment in the petition that the election was held according to law cannot be construed into a statement involving the matter of a subsequent contest growing out of such election. The right of a legislative body to determine the election and qualification of its own members is not here presented, but the election and qualification of the chief executive officer alone is involved. It follows that the contest of such an election is, therefore, to be conducted under the provisions of the general law of the state.

It is further claimed by petitioner that Santa Monica having been a city of the fifth class before it adopted its charter, therefore the provisions of section 762 of the municipal corporations act, which provides that boards of trustees shall determine all election contests in cities of such class, is applicable to the contest under consideration. This law with relation to cities of the fifth class applies only to cities actually of that class, and when Santa Monica adopted its freeholders' charter and the same was approved by the legislature, the effect thereof was to remove that city from the classification of cities, at least to the extent of legislation applying especially to such class, and it became amenable to the general law of the state relative to election contests of the character here instituted. In addition to this, it may be observed that the corporations act referred to makes no provision for a mayor in cities of the fifth class, and, of course, no contest involving such office could possibly exist in a city under such a classification.

In what we have heretofore said we have disregarded the point made by respondent as to the adequacy of appeal on account whereof prohibition will not lie. This we have done because upon this rehearing we are not agreed upon the question as to an appeal in such a contest affording a speedy and adequate remedy, and rest the decision upon the merits of the petition as presented.

The writ is denied.

A petition for a rehearing of this cause was denied by the district court of appeal, on May 18, 1910.

[Civ. No. 753. First Appellate District.—April 19, 1910.]

A. E. HOUSE, Appellant, v. J. P. PONCE, Respondent.

ACTION TO QUIET TITLE—POSSESSION OF DEFENDANT—DEFENSE OF TAX TITLE—BURDEN OF PROOF.—Where the complaint in an action to quiet title alleged ownership and right of possession of the lots in controversy, and possession by the defendant, who took issue on plaintiff's ownership, and set up a tax title in himself acquired from the state, the burden of proof is upon the plaintiff to show title in himself, to overcome the possession of the defendant; and if he fails in such proof, it is not necessary to inquire into his objections to defendant's tax title, for if he has no title, he could not disturb defendant's possession, and it was not his business as to whether or not defendant's paper title was perfect.

ID.—TITLE ASSERTED UNDER QUITCLAIM DEED—BONA FIDE PURCHASE NOT SHOWN—WANT OF CONSIDERATION—ABSENCE OF TITLE—PRIOR DEEDS.—Where the evidence of title in plaintiff was by virtue of a quitclaim deed of the lots to his predecessor from one who owned the lots at the time of the assessment for taxes and sale to the state, and there was no evidence that plaintiff paid any value for the transfer to him, but it was proved that no consideration was paid for the quitclaim deed, and that the grantor prior thereto had sold and conveyed all the lots to third persons, the evidence shows the absence of the title asserted by the plaintiff.

ID.—EFFECT OF PRIOR DEEDS—RECORD NOT SHOWN.—The prior deeds by the grantor of the quitclaim deed, though not shown to have been recorded, were good and passed title as to all persons, save a subsequent purchaser or mortgagee in good faith, and for a valuable consideration.

ID.—EFFECT OF QUITCLAIM DEED—NOTICE TO GRANTEE—ASSUMPTION OF RISK OF TITLE.—The fact that the grantor refused to make any other deed than a quitclaim was notice to the grantee sufficient to put him on inquiry as to the grantor's title. In the absence of such inquiry, he assumed all risks as to title, and knew that he was taking only such title as might be left in the grantor. If, in fact, no title was left in him to convey, none was conveyed.

ID.—INEQUITABLE PURPOSE OF PROCURING QUITCLAIM TITLE—ASSAULT UPON TAX TITLE.—If plaintiff procured the quitclaim title for the purpose of acquiring a standing upon which to come into court and attack defendant's tax title, such purpose does not commend itself to a court of equity. The defendant being in possession under a deed from the state, regular in form, for which he paid a valuable consideration, and thus enabled the state and county to collect the taxes, which had been assessed upon the lots, cannot be disturbed

for light or trivial reasons, or by a stranger who had nothing but a quitclaim from one who had no title.

ID.—AIM OF LAW—UNJUST CLAIM NOT ENFORCED.—The law aims to do justice and prevent wrongs, and will not grant affirmative aid to one who proves no title to relief and relies upon a mere piece of paper made without consideration by one having no title.

ID.—EVIDENCE SHOWING WANT OF TITLE—TESTIMONY OF GRANTOR OF QUITCLAIM DEED—DECLARATIONS IMPEACHING TITLE NOT INVOLVED. The testimony of the grantor of the quitclaim deed was properly admitted to show that he sold and conveyed all the lots he owned prior to the quitclaim deed, and that at that time he had no lots, and conveyed nothing when he made the quitclaim deed. Such evidence does not involve any declarations tending to impeach the title conveyed.

APPEAL from a judgment of the Superior Court of Santa Clara County. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

A. H. Jarman, for Appellant.

Rogers, Bloomingdale & Free, for Respondent.

COOPER, P. J.—This action was brought for the purpose of quieting plaintiff's alleged title to certain lots described in the complaint as being in College Terrace in Santa Clara county. Defendant had judgment, and plaintiff prosecutes this appeal from the judgment on the judgment-roll accompanied by a bill of exceptions.

The complaint alleged that the plaintiff was the owner and entitled to the possession of the lots, and that defendant was in possession thereof claiming some interest or estate therein. The answer denied the ownership of the plaintiff, and alleged the possession and right to the possession of the said lots in defendant. It further alleged that said lots were sold to the state of California on the twenty-sixth day of June, 1896, for delinquent taxes assessed and levied thereon for the year 1895; that thereafter on the twenty-seventh day of August, 1901, in pursuance of such sale, a deed to said lots was duly executed by the tax collector to the state of California; that thereafter, on the twentieth day of January, 1905, the state sold said lots according to law to defendant, who was the

highest bidder, for the sum of \$181, and in pursuance of such sale of the tax collector executed and delivered to defendant a deed to said premises, which deed defendant has placed of record.

The court found that the plaintiff was not at any time the owner nor entitled to the possession of said lots; that the defendant was the owner, in the possession, and entitled to the possession thereof. The court also found that all the proceedings as set forth in the answer from the said assessment up to and including the execution of the deed to defendant, were regular, and that the tax deed was valid and conveyed a valid title to defendant.

Plaintiff contends that there were several irregularities in regard to the assessment, the notice of sale, the manner of sale and the amount thereof, sufficient to justify us in holding the tax deed void. In view of the conclusion we have reached it is not necessary to examine nor to discuss the several alleged informalities in the proceedings by which the tax deed was finally executed and delivered to defendant. It is well settled that the plaintiff, having alleged that he was the owner of the lots and entitled to the possession thereof, was required to prove that he was such owner, and the burden was upon him to make such proof. He was entitled to relief only upon showing title in himself, for if he had no title he could not disturb even the possession of defendant, and it was not his business as to whether or not defendant's paper title was perfect. (*Martin v. Lloyd*, 94 Cal. 195, [29 Pac. 491]; *Winter v. McMillan*, 87 Cal. 256, [22 Am. St. Rep. 243, 25 Pac. 407]; *Heney v. Pesoli*, 109 Cal. 53, [41 Pac. 819]; *McGrath v. Wallace*, 116 Cal. 549, [48 Pac. 719].)

It may be conceded that at the time of the assessment and also at the time of the sale to the state the lots were owned by one Alexander Gordon. The record shows that plaintiff in proof of his title introduced in evidence a deed of said Gordon to one Farley, followed by a deed from said Farley to plaintiff. It does not appear that the deeds were read in evidence; nor is there anything as to the date or contents other than the statement that the deeds conveyed the property described in the amended complaint. This statement, of course, can mean nothing more than that the deeds were correct in form and purported to convey the premises as de-

scribed in the amended complaint. Defendant called Gordon as a witness, and he testified that about February, 1906, said Farley came to the witness' house claiming to represent someone else, and wanted to get a deed to the lots; that Farley presented a bargain and sale deed, which witness declined to sign, but he finally, after some conversation, signed a quitclaim deed to Farley; that witness received no consideration for the deed; that witness at the time he made said quitclaim deed to Farley did not own the lots, but had conveyed two of them to W. J. Walsh in May, 1888, two of them to John Robinson in April, 1889, and the other two to Levi Van Fossen in 1893; that witness had disposed of all of said lots and given deeds to them prior to 1895. These deeds, although it does not appear that they were recorded, were good as to all persons save a subsequent purchaser or mortgagee in good faith and for a valuable consideration (Civ. Code, sec. 1214). The evidence of Gordon is not contradicted, and plainly shows that no title was in him when he conveyed to Farley. There is not a word of evidence even tending to show that plaintiff paid any consideration for the lots, or that he was a *bona fide* purchaser. The fact that Gordon refused to make any other than a quitclaim deed was notice to Farley, and sufficient to put him upon inquiry. The grantee in said quitclaim deed assumed all risks as to title. He took, and knew he was taking, only such title as was left in Gordon. There being no title in Gordon nothing was conveyed. There is no explanation as to why the plaintiff procured the quitclaim deed. If he did it for the purpose of acquiring a standing upon which to come into court and attack the defendant's tax title, such purpose does not commend itself to a court of equity. The defendant being in possession under a deed from the state, regular in form, for which he paid a valuable consideration, and thus enabled the state and county to collect the taxes which had been assessed upon the lots, cannot be disturbed for light or trivial reasons, or by a stranger who has nothing but a quitclaim deed from one who had no title. The law aims to do justice and prevent wrongs. One claiming its affirmative aid to quiet his title must prove such title, and not rely upon a mere piece of paper made without consideration by one who had no title.

The testimony of Gordon was properly admitted. It was not in the nature of declarations tending to impeach the title which he had conveyed by the quitclaim deed, but was for the purpose of showing that he in effect had nothing to convey, and conveyed nothing at the time he made the quitclaim deed.

The judgment is affirmed.

Hall, J., and Kerrigan, J., concurred.

[Civ. No. 676. Third Appellate District.—April 19, 1910.]

D. J. SIMMONS, Appellant, v. MARY SWEENEY, Respondent.

ACTION BY BROKER—BREACH OF WRITTEN CONTRACT OF SALE—FINDING—SUBSTITUTION OF ORAL CONTRACT—SALE AT AUCTION NOT EFFECTED.—In an action by a real estate broker to recover damages for breach of a written contract to pay one-third of all profit from a sale of land at \$19,000 for which \$16,250 had been paid, on account of prevention by the owner of an auction sale for \$20,400, a recovery cannot be had, where the court finds upon sufficient evidence that the written contract was superseded by the oral contract of the parties for a sale of the land at auction by the broker at his own expense, at which the owner was to receive \$21,000, and the broker was to receive all above that sum, which might prove more profitable to him, it being expressly agreed that if \$21,000 was not realized, all sales were to be declared off, which was done, with the effect that no purchaser was obtained or sale effected.

ID.—RESCISSION—NOVATION.—The evidence sustains a rescission of the written agreement, and the substitution of the parol contract; or, in other words, it shows a clear case of novation, which, under section 1530 of the Civil Code, is "the substitution of a new obligation for an existing one."

ID.—CONSTRUCTION OF EVIDENCE UNDER FINDING—QUESTION OF FACT FOR TRIAL COURT.—Under the construction that this court is bound to place upon the evidence, it is incontrovertible that, after the execution of the written contract, and before any services were performed under its terms, the parties thereto entered into an entirely different parol agreement respecting the same subject matter; and it is a question of fact for the trial court to determine from all the facts and circumstances whether the parol agreement was in-

tended to be substituted for the written agreement, and whether the subsequent conduct in attempting to sell the property is referable to the parol agreement.

ID.—INCONSISTENCY OF TERMS OF CONTRACTS—ANNULMENT OF WRITTEN CONTRACT—LOSS OF COMPENSATION.—The terms of the two contracts were entirely inconsistent, and could not be operative at the same time. It is reasonable to conclude that the written contract was annulled by consent, and that, since appellant failed to sell the property for the agreed sum, he was entitled to no compensation.

ID.—ELECTION BY APPELLANT—LOSS OF RIGHTS AND OBLIGATIONS UNDER WRITTEN CONTRACT.—If appellant intended to rely upon the written contract, he should have declined to accept and act upon the proposition subsequently submitted to him by respondent. He was called upon to exercise his election, and he chose to take his chances of a larger compensation under the second parol arrangement; and by accepting respondent's new proposal and subsequently acting thereon, the rescission of the first contract was entirely consummated, and it was then too late for him to seek a revival of the privileges and obligations of the written contract.

ID.—FREEDOM OF CHOICE—ABSENCE OF MENACE OR DURESS.—There was no interference with the freedom of the appellant's choice by the statement that in the proposed auction sale, respondent must have \$21,000 as her share, or there would be no sale; such a declaration did not amount to menace or duress, where nothing else appears calculated to inspire fear in the mind of appellant or to influence unduly his judgment. The mere threat to withhold from a party a legal right which he has an adequate remedy to enforce is not, in the eyes of the law, duress.

ID.—CONSIDERATION OF NEW AGREEMENT—MISTAKE OF JUDGMENT.—The new agreement was supported by a sufficient consideration in the right given to appellant to retain whatever was received for the property in excess of \$21,000, by which it was believed that he would be amply compensated. The fact that subsequent events proved the parties to be mistaken in their judgment does not affect the question of compensation.

ID.—PAROL AGREEMENT NOT WITHIN STATUTE OF FRAUDS.—The parol agreement, having become entirely executed, was not within the statute of frauds, as purporting to transfer an interest in real property. Under section 1661 of the Civil Code, "an executed contract is one the object of which was fully performed."

ID.—SUPPOSITION OF INVALIDITY OF PAROL AGREEMENT—PURCHASER NOT FOUND UNDER WRITTEN AGREEMENT.—Upon the supposition of the invalidity of the parol agreement, and the continuance of the written agreement in force, there can be no recovery thereunder, for the reason that the broker has failed to prove that he obtained a

purchaser for the property, ready and willing to make the purchase in accordance with the terms imposed by the seller.

ID.—DUTY OF BROKER NOT PERFORMED — DISMISSAL OF PROSPECTIVE BUYER.—It cannot be said that the duty of the broker has been performed, when, by his own act, he has dismissed the prospective buyer and acquitted him of any connection with the transaction and of any obligation to purchase.

APPEAL from an order of the Superior Court of Sacramento County, denying a new trial. Peter J. Shields, Judge.

The facts are stated in the opinion of the court.

B. F. Howard, and J. R. Hughes, for Appellant.

J. B. Devine, and J. W. S. Butler, for Respondent.

THE COURT.—The action is for damages for the violation of a contract. In December, 1906, appellant procured from one Henderson an option on lots 5, 6, and east half of lot 7, bounded by M and N and Sixteenth and Seventeenth streets, in the city of Sacramento, for the sum of \$16,000. Shortly afterward appellant entered into an agreement with respondent whereby she was to purchase the property for \$16,250 and give him one-third of the profits above \$16,250 when the property could be sold for as much as \$19,000. Accordingly appellant procured Henderson to deed the property to respondent for said consideration, \$250 of the amount being paid to Simmons.

In the spring of 1907 the parties herein reduced their agreement to writing, as follows: "Lots 5, 6 and east half of lot 7, M and N, 16th and 17th streets. Price paid \$16,250, selling price \$19,600. Mrs. Sweeney to receive $\frac{2}{3}$ of the profit; D. J. Simmons to receive $\frac{1}{3}$ of the profit. Signed, D. J. Simmons; Mary Sweeney." Appellant claims that "It is for the violation of said contract by respondent in preventing a sale of said property for \$20,400 at an auction sale had April 23, 1908, and refusing to stand by the terms thereof and divide the profits, as provided in said contract, that damages are sought in this action."

The court found that said written agreement was executed by appellant and respondent, and further that in "April,

1908, it was mutually agreed between the plaintiff and defendant that the plaintiff, who is an auctioneer, should advertise and sell said property at public sale, and that said property should not be sold at said sale for less than \$21,000, and that if the bids for said property offered at said sale should not aggregate said sum of \$21,000 said property should not be sold and should be withdrawn from sale, and that the plaintiff (defendant?) should have and receive as her portion of the purchase price of said property at said sale the sum of \$21,000, and not less, and that defendant (plaintiff?) should receive all sums for which said property should be sold at said sale in excess of said sum of \$21,000." It is further found that in pursuance of said agreement plaintiff advertised the sale to take place on Thursday, April 23, 1908, at 10 o'clock A. M.; that on said date he, "in the presence of the defendant and in the presence of various persons who were assembled at said sale, stated to the persons present at said sale that he would offer the said property in subdivisions and would receive bids upon said subdivisions so offered, and that after having offered all of said property in subdivisions for sale he would then offer the property as a whole for sale and receive bids thereon, and that in the event the bids offered for said property, either in subdivisions or as a whole, did not aggregate the sum of \$21,000, that the sale of the property as a whole or in subdivisions would be declared off and that said property would be withdrawn from sale"; that the property was thereupon offered for sale and that certain bids were received for the subdivisions, aggregating less than \$21,000. "That the said plaintiff, after he had received said bids as aforesaid, for said property in subdivisions, thereupon announced that he would offer the property for sale as a whole, and he thereupon did offer said property as a whole for sale, but received no bids therefor. Thereupon the said plaintiff, in the presence of defendant, and in the presence of said bidders aforesaid and the bystanders at said sale, declared that inasmuch as the bids offered for said property did not aggregate the sum of \$21,000, that the said sale and the said sales of said subdivisions was and were off, and that the said property was withdrawn from sale, and the said bids or offers were, and each of them was, rejected."

There is a finding, also, that none of said bidders made any tender to defendant or demanded a deed or renewed his bid or offer to buy said property or any of the subdivisions thereof.

The evidence is abundantly sufficient to support the finding that this parol agreement was made and that plaintiff conducted said auction in accordance with its terms. The testimony of the plaintiff himself is to that effect. He testified that "At that meeting Mrs. Sweeney said she wanted twenty-one thousand dollars for her interest in the property. I said this, that I would go on and advertise it, pay all the expenses out of my pocket, and would endeavor to get—she said the property ought to bring twenty-five thousand dollars, and she says 'if it brings enough to cover my interest and my expense'—I told her I did not think it would bring that much, but that it would bring twenty-two thousand five hundred, and she told me that at that time she wanted twenty-one thousand, and she said at that time that all I got over twenty-one thousand I could have. I advertised the property and said I would try and see. If the property brought twenty-two thousand five hundred I was to get fifteen hundred. If it brought twenty-five thousand I was to get four thousand. If the property did not bring twenty-one thousand, the sale was not to go and the sale was to be declared off; that was the distinct understanding. The day of the sale I cried the property in the usual way, offering the land in parcels. Before the sale I told the bidders I was going to subdivide it and offer it in parcels or pieces, as I described them how I was going to offer them, and told them that the highest and best bidder would get them, provided that it brought a certain amount; I said this very clearly. I do not think I told them how much it was to bring. I might have said that it must bring twenty-one thousand, but I don't recollect. I then told the various bidders on the subdivisions or several parcels I would offer the piece of property as a whole, and that if it did not bring the sum required by Mrs. Sweeney that the sale would be off. I thereupon cried the parcels and obtained certain bids on them. At the conclusion of the sale, so far as the sale of the subdivisions was concerned, I offered it as a whole, stating that the property did not bring

the price Mrs. Sweeney wanted. I received no bids upon the property as a whole and I thereupon declared the sale off."

The terms of the agreement are recited in substantially the same way by respondent. She adds the statement that appellant declared he would take the responsibility on his own shoulders and pay the expenses of the auction sale and Mrs. Sweeney was to get \$21,000.

There is thus shown a rescission of the written agreement and the substitution of the parol contract. In other words, we have the clear case of a novation, "the substitution of a new obligation for an existing one." (Civ. Code, sec. 1530.) Under the construction we are bound to place upon the evidence there can be no controversy that after the execution of said written agreement, and before any services were performed under its terms, the parties thereto entered into another and entirely different agreement concerning the same subject matter. The only possible question that could arise would be whether this was intended to be substituted for the written agreement and whether the subsequent conduct of appellant in attempting to sell the property is referable to said parol agreement. This was for the court to determine from all the facts and circumstances. While there was no express declaration that the parol contract was to supersede the written one, no other conclusion seems reasonable. The terms of these two contracts were entirely inconsistent and could not be operative at the same time. But the evidence for respondent shows conclusively that everything done by appellant toward effecting a sale of the property was in pursuance of the said parol agreement. He followed its terms in advertising the property and announced to the bidders that their bids were rejected and the property withdrawn because it did not bring the said amount of \$21,000. In fact, no one can read the evidence dispassionately without reaching the conclusion that the earlier agreement was entirely annulled by consent and, since appellant failed to sell the property for the sum agreed upon, he was entitled to no compensation.

If appellant intended to rely upon the first contract he should have declined to accept and act upon the proposition subsequently submitted by respondent. He was called upon to exercise his election and he chose to take his chances of getting a larger compensation under this second arrangement.

The rule approved by our supreme court in *Alderson v. Houston*, 154 Cal. 11, [96 Pac. 884], is stated as follows in *Lake Shore etc. Ry. Co. v. Richards*, 152 Ill. 59, [38 N. E. 773]: "Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as substituting and binding upon him, or by his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party, and it can make no difference whether the contract has been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that that determination had been reached and is being acted upon. It would seem clear on principle that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not of themselves amount to a breach, so as to create an *effectual* renunciation of the contract, for one party cannot by any act or declaration destroy the binding force and efficacy of the contract. As said by Bowen, L. J., in *Johnstone v. Milling*, 16 Q. B. Div. 460: 'Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen* and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. . . . If he does so elect, it becomes a breach of contract, and he can recover upon it as such.' Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages. These views are amply sustained by numerous decided cases." It is difficult to conceive how any other position could be taken with any show of reason. In the case at bar, appellant not only failed to elect to stand upon the original contract and to regard the

acts and declarations of respondent as a repudiation of its terms and entitling him to the commission provided therein, but he accepted respondent's new proposal, subsequently acted upon it, and thereby the rescission of the former contract was entirely consummated. It was then too late to seek a revival of the privileges and obligations of the written contract. They had disappeared as completely as though never existing.

The specific grounds upon which appellant attacks the second agreement and the conclusion of the trial court drawn therefrom are, as stated by him: "Said so-called agreement was invalid and of no binding force on the rights, duties and obligations of the parties, or either of them, as laid down in the said written agreement, in this: 1. It was not a mutual agreement within the meaning of the law. 2. There was no sufficient consideration to support it. 3. It was an oral agreement conveying an interest in real property. 4. It was an unexecuted oral agreement changing the terms of a written agreement."

None of these contentions can be successfully maintained. The want of mutuality is affirmed on the pretext that appellant was coerced by the assumption of authority on the part of respondent. He was confronted, so it is claimed, by the menacing declaration that respondent "must have \$21,000 for her share or there would be no sale." But it is too plain for argument that there was no interference nor attempted interference with the freedom of appellant's choice. We are not aware of any authority holding that such a declaration amounts to menace or duress. The record does not disclose anything in the appearance or manner of respondent calculated to inspire fear in the mind of appellant or to influence unduly his judgment. "The mere threat to withhold from a party a legal right which he has an adequate remedy to enforce, is not, in the eyes of the law, duress. Certainly not such as will evade the execution of a contract." (*Cable v. Foley*, 45 Minn. 421, [47 N. W. 1135]; *Taylor v. Ford*, 131 Cal. 440, [63 Pac. 770]; *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, [103 Pac. 938].) We find nothing to indicate either legal or moral duress.

It is equally clear that there was a sufficient consideration to support the agreement. Appellant acquired the right to

retain whatever was received for the property in excess of \$21,000. It was believed that the property could be sold for such an amount as would amply compensate appellant for his services. That subsequent events proved the parties to be mistaken in their judgment does not affect the question of consideration.

If the property had been sold for a large amount in excess of the sum to be paid respondent it would be equally as reasonable to contend that there was no consideration for the contract. The truth is, of course, that the opportunity for benefit to both parties and the expectation of realizing it growing out of the terms of the agreement are sufficient to make it binding. If we were willing to concede the soundness of appellant's position that the agreement in question purported to convey an interest in real property it would signify nothing, as it is manifest that it was entirely executed and therefore taken without the statute of frauds. "An executed contract is one the object of which is fully performed." (Civ. Code, sec. 1661.)

When it was found that the property would not bring \$21,000 there was nothing left for appellant but to declare the bids rejected and the property withdrawn from sale. This was done voluntarily by appellant and the contractual relation terminated. It may be that he would have been authorized to advertise the property again and repeat the effort to sell, but that question is not involved, since appellant pursued the matter no further, but treated the contract as at an end and brought suit for his commission.

But, in addition to the foregoing, it must be said that if the parol agreement was invalid appellant has not shown himself entitled to recover under the written agreement. Since he acquiesced in the new proposal the most that could be claimed would be that the written contract is still operative. But as a basis for any commissions under this, appellant must prove that he obtained a purchaser for the property. "Before a broker can be said to have earned his commission it must be shown that he provided a purchaser who was ready and willing to make the purchase in accordance with the terms imposed by the seller." (*Zeimer v. Antisell*, 75 Cal. 509, [17 Pac. 642].) It cannot be said that this duty has been performed when the agent by his own act has

dismissed the prospective buyer and acquitted him of any connection with the transaction and of any obligation to purchase.

There can be no doubt, we think, that the findings are supported by the evidence and that no error was committed by the lower court.

The order denying the motion for a new trial is affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 17, 1910.

[Civ. No. 771. First Appellate District.—April 20, 1910.]

In the Matter of the Estate of JOSEPH GOETZ, Deceased.
EDOUARD LESAGE et al., Children of JULES LESAGE, Deceased, Appellants, v. ALBERT GOETZ and CAMILLE GOETZ et al., Respondents.

WILLS—CONSTRUCTION AND EFFECT—LAPSED LEGACY—PART OF RESIDUE—STATUTE OF DESCENT INAPPLICABLE.—Where it satisfactorily appears from the terms of a will that the testator intended that in case of legatees who should die prior to his death the legacies bequeathed to them should lapse and become part of the residue of his estate, the terms of the will must control in that respect, and the provision of section 1310 of the Civil Code, that when a devisee or legatee who is a relation of the testator dies before his death, leaving lineal descendants, such descendants shall take the same share which would have passed to the devisee or legatee had he survived the testator, is inapplicable in such case.

ID.—INTENTION OF TESTATOR—UNTECHNICAL TERMS EMPLOYED IN SELF-DRAWN WILL.—It is sufficient that the intention of the testator as to the disposition of lapsed legacies can be readily ascertained, notwithstanding the use of inartificial terms in expressing his intention in a will drawn by the testator himself, who is a foreigner by birth, unable to express himself with technical accuracy. In order to learn his intention, the whole will may be examined, and words may be interpolated or transposed, and the use of technical words incorrectly will be taken as if correctly used.

ID.—USE OF WORDS "DEVISE" AND "BEQUEATH"—MISUSE OF WORDS.—The words "devise," "bequeath" and corresponding terms are frequently employed interchangeably, especially by testators who are not lawyers and who draw their own wills. Some words are so

frequently misused by testators that very little argument is needed to move the court to reject them and substitute others in their place. The will in question uses the words "legacy or bequest" to include a devise, and the word "devise" to include a "legacy," and the word "devise" with sense of "devisee."

ID.—CORRECTION OF INACCURATE CONTINGENT CLAUSE AS TO LAPSED LEGACIES.—A clause in the will reading: "And devise so bequeathed by me should die prior to my death the legacies to them mentioned in this will shall lapse, and such legacies shall form part of my residuary estate," evidently refers to a contingent event, and the word "If" should be inserted at the beginning of the clause, and the words "and devise," changed to "any devisee." In view of the law applicable to lapsed legacies, and the whole language of the will, the testator evidently intended that legacies lapsing by the prior death of legatees should include all legacies mentioned in the will.

ID.—CODE PROVISION AS TO CONSTRUCTION OF WILL—"CLEAR AND DISTINCT BEQUEST"—INAPPLICABILITY TO CHILDREN NOT REFERRED TO. Section 1322 of the Civil Code provides a rule applicable only to the construction of a will, where a clear and distinct devise or bequest is sought to be affected by a provision of the will not equally clear and distinct; and that section can have no application to children of a deceased legatee whose legacy has lapsed as provided in the will, and has become part of the residue of the estate, if such children are in no wise referred to or provided for as beneficiaries under the will. That section does not provide that when one may be entitled to a legacy by force of the statute, any intention of the testator to prevent the operation of the statute must be as clear and distinct as the statute itself.

ID.—STATUTE OF DESCENT IN CASES OF LAPSED LEGACIES NO PART OF WILL—APPLICABILITY.—The statute of descent in cases of lapsed legacies, embodied in section 1310 of the Civil Code, is no part of the will itself, and cannot be affected by section 1322 of the Civil Code. The statute of descent can only apply where there is no intention to the contrary expressed by the testator in his will.

ID.—PARTIAL DISTRIBUTION UNDER WILL PROPERLY REFUSED.—A petition for partial distribution under the will in behalf of children of a deceased legatee, whose legacy has lapsed and become part of the residue of the estate, under the terms of the will, was properly refused, and the order refusing it must be affirmed upon appeal.

APPEAL from an order of the Superior Court of the City and County of San Francisco, denying a petition for partial distribution. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Louis Bartlett, and Arthur H. Brandt, for Appellants.

P. A. Bergerot, A. P. Dessouslavy, and Jellett & Meyerstein, for Louis Albert Goetz et al., Respondents.

Gustave Gutsch, for Camille Goetz et al., Respondents.

KERRIGAN, J.—This is an appeal from an order denying petitions for partial distribution of the above-named estate. Joseph Goetz by his last will, executed May 11, 1904, bequeathed to his nephew Jules Lesage the sum of \$30,000. Toward the end of that year Jules Lesage died. Three years later the testator died. The appellants are children of Jules Lesage and the respondents are the executors of the will and certain beneficiaries thereunder.

The provisions of the will involved in this appeal read as follows:

“Third: I give and bequeath to Jules Lesage my nephew who resides in the city of Mulhausen Alsace Germany the sum of Thirty thousand dollars (\$30,000).”

“Twelfth: and devise so bequeathed by me should die, prior to my death the legacies, to them mentioned in this will shall lapse, and such legacies shall form a part of my residuing estate.”

At the time of the execution of the will and at the time of the death of Jules Lesage, section 1310 of the Civil Code provided that a devise to a relative of the testator, in case of the death of the devisee before that of the testator, should be taken by the lineal descendants of such devisee; but the section was silent in the case of a legacy under the same conditions, and consequently, following the general rule of law, such legacy lapsed. (*Estate of Ross*, 140 Cal. 282, [73 Pac. 976].) Two years before the testator's death this section was amended so as to prevent the lapsing of such legacies, and it now reads as follows (the portion added by the amendment being indicated by italics):

“When any estate is devised *or bequeathed* to any child, or other relation of the testator, and the devisee *or legatee* dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner

as the devisee *or legatee* would have done had he survived the testator.”

Appellants' chief contentions are (1) that the will took effect at the death of the testator, and that under the section of the code above quoted, as amended in 1905, they are entitled to the legacy bequeathed to their father; (2) that clause 12 of the will is less clear and distinct than is the so-called legacy to the children of Jules Lesage, and that therefore, under section 1322 of the Civil Code, the legacy is not affected by clause 12.

Independently of what may be the correct solution of appellant's first contention, we think the order of the trial court in denying the petition for partial distribution should be affirmed on the ground that from the twelfth clause of the will it satisfactorily appears that the testator intended that legacies given to persons who predeceased him should lapse, and such intention under the circumstances of this case must control. Although this clause of the will is not as clear as could be desired, nevertheless, the intention that the testator sought to express therein can be readily ascertained. In order to learn his intention the whole will may be examined, and words may be interpolated or transposed. (*Mitchell v. Donohue*, 100 Cal. 202, [38 Am. St. Rep. 279, 34 Pac. 614]; *Estate of Stratton*, 112 Cal. 513, [44 Pac. 1028]; *Estate of Wood*, 36 Cal. 75.) And in this connection it is also important to remember that the words “devise,” bequeath” and corresponding terms are not invariably used with technical accuracy, but on the contrary they are frequently employed interchangeably, and especially by testators who are not lawyers, and who draw their wills. (*In re White*, 125 N. Y. 551, [26 N. E. 909]; *Logan v. Logan*, 11 Colo. 44, [17 Pac. 99]; *People's Trust Co. v. Smith*, 82 Hun, 494, [31 N. Y. Supp. 522].) In Underhill on Wills, volume 1, page 498, it is said: “Some words are so frequently misused by testators that very little argument is needed to move the court to reject them and to substitute others, in their place. Thus, for example, the words ‘devise and bequeath’ and ‘devise and legacy,’ ‘heir,’ ‘legatee or devisee’ are used interchangeably in common parlance, and very frequently are incorrectly employed by testators unfamiliar with technical language who write their own wills.” (See, also, 14 Cyc. 28.)

In the will before us in clauses 4 and 5, in referring to real estate the testator uses the words "bequeath" and "bequeathed." In clause 12 he places the words "devise" and "bequeathed" in juxtaposition. The word "devisee" is not correctly spelled anywhere in the whole will. In the 14th clause the testator provides that if "any person" named in this will should contest the same, the *legacy* or *bequest* made to the person so contesting shall be canceled; and in lieu thereof the sum of \$50 shall be given to said person so contesting. It is evident to us that the testator, by the use of the words "legacy or bequest" in this provision of his will, meant to include a devise also. The testator was a man advanced in years and a foreigner by birth, and the instances just given, as well as many others which might be referred to, show that he was unable to express himself in the English language with technical or even ordinary accuracy. In clause 12, presumably the testator wanted to use the word "devisee," but spelled it "devise." Again, this clause is in a part of the will which deals with contingent events, and we think the testator intended this clause to commence with the word "If," and that the word "and" at the beginning of the clause was intended for the word "any." In fact it is not seriously disputed that the clause should read: "If any devisee . . . should die prior to my death, the legacies to them in this will shall lapse," etc. At all events, upon a consideration of the law and of the whole will we do not hesitate to hold, as did the trial court, that the testator intended that clause 12 should at least apply to all the legacies mentioned in the will, including that to Jules Lesage.

But appellants claim that clause 12 cannot affect the legacy said to belong to the children of Jules Lesage, because that clause is not as clear and distinct as the legacy to them. This position is based on section 1310 of the Civil Code, already quoted, and on that portion of section 1322 of the Civil Code which reads as follows: "A clear and distinct . . . bequest cannot be affected . . . by any words not equally clear and distinct, or by inference or argument from other parts of the will."

Section 1322 lays down a rule of construction of a will, to be applied where a clear and distinct devise or bequest is sought to be affected by a provision of the will not equally

clear and distinct; and it is obvious that it has no application whatever to the question under consideration, for here the language of clause 12 does not affect or modify the legacy to Jules Lesage, but merely directs the disposition of the fund constituting the legacy in case the legatee should predecease the testator. The argument of appellants is based upon the theory that the legacy was to the children of Jules Lesage, or that the statute makes them the beneficiaries of the legacy, in case of the death of their ancestor, in spite of the intention of the testator expressed to the contrary. Here there was no legacy to the children, clear and distinct or otherwise; and section 1322 does not provide that when one may be entitled to a legacy by force of statute, any intention of the testator to prevent the operation of such statute must be as clear and distinct as the statute itself. That section does not come into play as between provisions of the law and clauses of a will, but it is a rule of construction of the will itself under the circumstances plainly stated in the section. Assuming that a will made prior to the amendment of 1905 to section 1310 falls under the operation of the amendment, still the statute can only be applied where there is no intention to the contrary expressed by the testator in his will; and it is sufficient if that intention can be fairly ascertained from the language used, and it need not be in clear and precise terms. Here such an intention is expressed, and it is incontrovertible, we think, that that intention must control, and that section 1322 is inapplicable.

The order is affirmed.

Hall, J., and Cooper, P. J., concurred.

[Crim. No. 116. Third Appellate District.—April 25, 1910.]

THE PEOPLE, Respondent, v. O. E. HOFFMAN, Appellant.

CRIMINAL LAW—ARSON—ABSENCE OF ARGUMENT—ERROR NOT APPEARING—AFFIRMANCE.—Upon appeal by a defendant convicted of arson in the second degree, where the case was submitted without oral or written argument for appellant, and upon examination of the record, it appears that the evidence against the defendant, though circumstantial, cannot be held insufficient to support the verdict, that the instructions were fair and complete, and that in the trial of the case all rights of the defendant were scrupulously regarded and protected, and no error appearing in the record, the judgment and order appealed from must be affirmed.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

Charles H. Crocker, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

BURNETT, J.—The case was submitted without oral or written argument on the part of appellant. Since our attention has not been called to any alleged error, we would be justified in sustaining the action of the court below without any examination of the record. We have, however, carefully read the transcript and we find therein nothing to demand a reversal of the judgment. The evidence against the defendant was circumstantial in its nature, but we are not prepared to say that it was insufficient to warrant the verdict of guilty of arson in the second degree.

The instructions were fair and complete and, in the trial of the case, all the rights of the defendant seem to have been scrupulously regarded and protected by the learned trial judge.

No error appearing, the judgment and order denying the motion for a new trial are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 125. Third Appellate District.—April 25, 1910.]

THE PEOPLE, Respondent, v. JAMES R. STANLEY, Appellant.

CRIMINAL LAW—FORGERY—ABSENCE OF ARGUMENT FOR APPELLANT.—

Upon appeal from a conviction for forgery, where no further proceeding appears to have been taken by appellant since the taking of the appeal, and an examination of the record shows that no reason exists for an interference with the action of the trial court, the judgment and order appealed from must be affirmed.

APPEAL from a judgment of the Superior Court of Siskiyou County, and from an order denying a new trial. James F. Lodge, Judge.

The facts are stated in the opinion of the court.

Beard & Beard, and I. R. Wells, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

BURNETT, J.—The defendant was convicted of forgery and sentenced to the penitentiary for the period of five years.

A motion for a new trial was made and denied and a notice of appeal from this order and also from the judgment was given as provided by section 1239 of the Penal Code. No further proceeding seems to have been taken by appellant, probably for the reason that his counsel were satisfied after deliberation that no error was committed during the trial that would justify a reversal of the judgment. At any rate, an examination of the record convinces us that no reason exists for an interference with the action of the trial court, and the judgment and the order are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 118. Third Appellate District.—April 25, 1910.]

THE PEOPLE, Respondent, v. W. H. DUNNING, Appellant.

CRIMINAL LAW—LEWD AND LASCIVIOUS CONDUCT WITH CHILD—NONAPPEARANCE FOR APPELLANT—ABSENCE OF ERROR—AFFIRMANCE.—

Where a defendant convicted of the crime of lewd and lascivious conduct with a child, as provided in section 288 of the Penal Code, has appealed to this court, and no brief has been filed by appellant, and no appearance entered in his behalf for oral argument, and it appears from an examination of the record that the evidence abundantly supports the verdict, that the instructions are correct, and that no error prejudicial to the substantial rights of appellant appears to have been committed, the judgment and order appealed from must be affirmed.

APPEAL from a judgment of the Superior Court of Solano County, and from an order denying a new trial. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

Carl E. Lindsay, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

BURNETT, J.—Defendant was convicted of the crime of lewd and lascivious conduct with a child, as provided in section 288 of the Penal Code, and he appealed from the judgment and the order denying his motion for a new trial.

No brief has been filed by appellant and no appearance was made on his behalf when the cause was called for oral argument. The record, however, has been carefully examined and we find that the evidence abundantly supports the verdict, the instructions fully and accurately presented the questions of law involved and no error prejudicial to the substantial rights of appellant appears to have been committed. The judgment and order are therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 220. First Appellate District.—April 26, 1910.]

THE PEOPLE, Respondent, v. STETH A. SCOTT, Appellant.

CRIMINAL LAW—ARSON—CIRCUMSTANTIAL EVIDENCE—SUPPORT OF VERDICT.—Upon appeal from a judgment of conviction for the crime of arson, and from an order denying a new trial, where insufficiency of wholly circumstantial evidence to support the verdict is claimed, it is held, upon a consideration of the circumstances, and from the reading of the entire record, that, though the case is a close one, yet the evidence is deemed sufficient to sustain the verdict.

ID.—INSTRUCTIONS—REQUEST MARKED "GIVEN"—IMMATERIAL CHANGE IN LANGUAGE—JURY PROPERLY INSTRUCTED.—The fact that an instruction marked "Given" was slightly changed in language is immaterial, where the instruction was given in substance, and the subject thereof was fully covered. As to other instructions criticised, it is sufficient that it clearly appears that the jury was fully and fairly instructed by the trial judge upon every phase of the law appertaining to the case.

ID.—ABSENCE OF ERROR IN EVIDENCE.—It is held that no error was committed in the admission or rejection of evidence.

ID.—CONTINUANCES OF SENTENCE AFTER VERDICT—ORDERS PRIOR AND SUBSEQUENT TO AMENDMENT OF PENAL CODE.—Where the verdict was rendered, and continuances of sentence and judgment were extended for thirty days prior to the taking effect of the amendment of 1909 to section 1191 of the Penal Code, such continuances were regular, and a further continuance of eleven days thereafter, being less than ten after the five days allowed by the amended statute, for the purpose of hearing and determining a motion for a new trial, is also regular.

ID.—REVIEW OF CONTINUANCE AFTER CODE AMENDMENT UPON APPEAL—PURPOSE NOT SHOWN IN RECORD—PRESUMPTION UPON APPEAL.—Where the record upon appeal is silent as to whether the continuance for eleven days after the amendment of section 1191 took effect on June 13, 1909, was for the purpose of hearing and determining a motion for new trial, it must be presumed upon appeal in support of the order that it was granted for that purpose.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

Carl E. Lindsay, and Carroll Cook, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

KERRIGAN, J.—The defendant was convicted of the crime of arson of the second degree and sentenced to imprisonment in the state prison for the period of ten years. This is an appeal from the judgment and from an order denying defendant's motion for a new trial.

The fire occurred on the third story of a building situated at No. 25 Third street in San Francisco on February 21, 1909, shortly after 1 o'clock in the afternoon. For some time prior to that date one Miss Williams conducted a shorthand and typewriting school in rooms situated upon said third floor, and the defendant was the manager of the school and an instructor under Miss Williams. It is conceded that a portion of the premises was burned and that the fire was of incendiary origin; but the defendant contends that the verdict convicting him of the crime of arson is not sustained by the evidence. We have carefully examined the record with a view to determining this point, and are constrained to hold that the evidence is sufficient.

The theory of the prosecution was that the defendant set fire to the premises in order to enable Miss Williams to collect on her policy of insurance. Evidence was introduced showing a close and strong friendship between defendant and Miss Williams. On the subject of the fire itself two painters, who were at work painting on the third floor of the building, testified that the defendant was there as late as 12:45 P. M., which was shortly before the discovery of the fire, although defendant claimed that he left there an hour earlier. Another witness who knew the defendant testified that when the fire-engines and other fire apparatus were being hurried to the scene of the fire, the defendant was at a point within two blocks of the place and going away from it. The defendant on the other hand testified that at that time and for half an hour prior thereto he was a mile away, taking luncheon with Miss Williams and another woman. When Miss Williams insured the furniture and equipment of the school

originally and again when she increased the amount of her policy, the defendant was present and took an active part in the transactions; yet after the fire he disclaimed to the fire marshal having any knowledge at all on the subject of her insurance, and in an investigation into the origin of the fire, the defendant, in order to account for his whereabouts from the time he claimed to have left the building until he arrived at Larkin and Ellis streets for luncheon, stated that he had an engagement with one W. F. Berrill, and that he walked to the place of appointment at Seventh and Howard streets, and failing to find Berrill that he walked from there to Larkin and Ellis streets. Berrill, however, testified that he had no engagement with the defendant on that day. Other circumstances in the case pointing to the guilt of the defendant are that although it was desired that the painted portions of the third story should dry as quickly as possible, so that a session of school might be held on Tuesday, February 23d, the defendant, against the advice of the painters, ordered the window curtains drawn, the windows left open six inches from the bottom, the inner doors open and the outer doors locked. Immediately after the fire a certain book was found on the defendant's desk, with a leaf turned down at a part of the book entitled, "How to collect insurance."

The evidence is wholly circumstantial, and while it appears from a reading of the entire record that the case is a close one, nevertheless, we think that it is sufficient to sustain the verdict.

Appellant complains of the action of the trial court with regard to certain instructions. The first instruction requested by defendant was marked by the court "Given"; and, although, according to the reporter's transcript of the proceedings, it was not given in the exact language proposed, yet it was given in substance, and the subject matter thereof was fully covered. As to the other instructions criticised, it is sufficient to say that it clearly appears that the jury was fully and fairly instructed by the trial judge on every phase of the law appertaining to the case.

No error was committed in the admission or rejection of evidence.

The verdict finding the defendant guilty was rendered on May 11, 1909. The pronouncement of sentence and judg-

ment was continued from time to time until June 14, 1909, and upon that date was again continued until June 22d (being forty-one days from the finding of the verdict), when sentence and judgment were finally pronounced. Section 1191 of the Penal Code, as amended in 1909, provides in part that the court must pronounce judgment within not less than two nor more than five days after the verdict or plea of guilty, but that, for the purpose of hearing and determining a motion for a new trial, this time may be extended not more than ten days, etc. In *Rankin v. Superior Court*, 157 Cal. 189, [106 Pac. 718], it was held that unless the trial court pronounced its judgment within the five days specified in the section, or within an extension of time therein authorized, the defendant is entitled to a new trial. The verdict of the jury in the present case was rendered before the amendment to section 1191 became law, the amendment being approved April 14, 1909, and becoming effective June 13th following. The continuances prior to the one of June 14th were under the old law and were regular. The judgment was pronounced and the appeal taken after the amendment in question became operative; and it becomes necessary to consider the effect of the last order of continuance, viz., that of June 14, 1909.

This appeal was taken under section 1191 of the Penal Code as amended, and the record does not show that the continuance of June 14th (which was for more than five days) was made for the purpose of hearing and determining a motion for a new trial. Defendant therefore contends that he is entitled to a new trial. But such motion was in fact heard and denied; and in the absence of a showing by the record to the contrary we will presume that the court acted regularly, and that the continuance of June 14th was ordered for the purpose of enabling the court to hear and determine such motion. (*People v. Russell*, 156 Cal. 450, [105 Pac. 416].)

The judgment and order are affirmed.

Hall, J., and Cooper, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 25, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 23, 1910.

[Civ. No. 720. First Appellate District.—April 26, 1910.]

J. B. MORRELL, Respondent, v. SAN TOMAS DRYING AND PACKING COMPANY, and BALFOUR, GUTHRIE & CO., Appellants.

SALE OF PRUNE CROP—DELIVERY—EXTENDED TIME—TENDER AND RESALE OF REJECTED PART DURING EXTENSION—GENERAL DEMURRER TO COMPLAINT.—A complaint setting forth a written contract for the sale of the whole of a prune crop, to be delivered at an agreed price before a specified date, and an extension of time for performance, and the acceptance of the larger part, and the rejection of a specified number of pounds tendered during such extension, is not subject to a general demurrer on the ground that such rejected portion of the crop was sold upon notice before the expiration of such extended time.

Id.—RIGHTS UNDER EXTENDED TIME.—The extension of time pleaded was to give plaintiff further time to perform; and when plaintiff, within that time, offered to perform, the defendants were bound to accept, if in other respects the offer was in accordance with the contract. Upon defendants' refusal to accept the tendered fruit, the plaintiff was justified in reselling the same.

Id.—SPECIAL DEMURRER TO COMPLAINT—PRICE OR VALUE OF REJECTED PRUNES NOT SHOWN—UNCERTAIN ASCERTAINMENT OF DEFICIENCY. The court erred in overruling a special demurrer to the complaint for ambiguity and uncertainty, in that it does not show the price or value of the rejected prunes, and that it cannot be ascertained with certainty how the alleged deficiency on resale was determined.

Id.—STATEMENT OF DAMAGES FOR BREACH NOT SHOWN.—The complaint is further uncertain in that it does not contain or show any damages arising to the plaintiff from defendant's breach of the contract, in rejecting the last tender of the residue of the prunes contracted for.

Id.—VARIATION FROM BASIS PRICE ACCORDING TO SIZE—UNCERTAINTY AS TO SIZE.—Where it appears that a basis price per pound was agreed, with an agreed variation therefrom by increase or diminution according to size, the complaint was also uncertain in not showing the size of the rejected prunes, as bearing upon the agreed price or value thereof.

Id.—MEASURE OF DAMAGES FOR BREACH OF BUYER'S AGREEMENT IN CASE OF RESALE—UNCERTAINTY AS TO DIFFERENCE.—Under section 3311 of the Civil Code, the detriment caused by the breach of a buyer's agreement to accept and pay for personal property, if it has been resold under section 3049, is "the excess, if any,

of the amount due from the buyer over the net proceeds of resale." Though plaintiff probably intended to bring the complaint within this section, yet he has failed to show with certainty, or at all, that the "deficiency" referred to is the difference between the contract price of the rejected prunes and the amount for which they were resold, or to give any data from which such difference can be determined.

ID.—INSUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT FOR LOSS ON RESALE.—Where the same uncertainty and insufficiency which appears in the complaint, as to the price or value or size of the rejected prunes, or as to the difference on resale, appears in the evidence, a verdict for the amount of the alleged deficiency on resale of the rejected prunes is unsupported by the evidence.

ID.—VARIANCE BETWEEN AVERMENT AND PROOF.—Where the complaint alleges that the price of the entire prune crop was \$6,004.37, and the evidence shows without conflict that defendant paid plaintiff \$6,455.71 for the accepted prunes, it appears that plaintiff has been paid more than was due him for the entire crop. If the allegation of the complaint was a mistake, as suggested by plaintiff, as a witness, he made no effort to correct it.

ID.—EVIDENCE—MEANING OF CONTRACT—"MORRELL RANCH"—LEASES BY PLAINTIFF—QUANTITY OF PRUNES.—Where the contract called for the entire crop of prunes estimated at 100 tons grown and dried on the orchard known as the "Morrell ranch," evidence was admissible to show that the plaintiff "Morrell" was in fact working under leases three ranches, and that the contract contemplated the whole prune crop grown by "Morrell" under his three leases, which was in fact less than the estimated quantity.

ID.—AMBIGUITY IN CONTRACT—ORAL EVIDENCE TO IDENTIFY SUBJECT.—There was such an ambiguity in the contract as to authorize oral evidence to identify the subject of the contract.

ID.—CONFLICTING EVIDENCE—SUFFICIENCY OF QUALITY OF REJECTED PRUNES.—Where the evidence is conflicting as to whether the rejected prunes met the requirements of the contract as to quality, the verdict cannot be interfered with for that reason, notwithstanding the evidence seems to preponderate upon that point against the plaintiff.

ID.—TESTIMONY OF PLAINTIFF—RESALE OF PRUNES—ACCEPTANCE BY PURCHASER AFTER EXAMINATION—RESTRICTION OF CROSS-EXAMINATION—ERROR.—After permitting plaintiff to testify that the rejected prunes were bought on resale for the Presto Fruit Company, after examination and acceptance by them, it was error for the court to restrict the right of cross-examination, by disallowing questions as to what was done with the prunes, and whether or not prunes could be used in the process employed by that company that would not be suitable for shipping in boxes.

ID.—OBJECT OF PLAINTIFF'S EVIDENCE—LESSENING OF WEIGHT.—It being the clear object of plaintiff's testimony to show that the rejected prunes were merchantable, and complied with the contract, the weight of his evidence might have been materially affected, if on cross-examination it were shown that the prunes in question were used in a process not requiring choice fruit.

ID.—ERRONEOUS INSTRUCTION AS TO INTEREST—CONSTRUCTION OF CODE. The court erred in instructing the jury as to interest on the amount found due on the rejected prunes from the date of their rejection, if found to be unjustifiable. The rule for damages in such case is laid down in sections 3311 and 3357 of the Civil Code, which must be taken together, and exclude the allowance of interest, and must govern as to that subject matter, to the exclusion of the general rule of interest in section 3187, which is in a different chapter.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. John E. Richards, Judge.

The facts are stated in the opinion of the court.

Will M. Beggs, and R. C. McComish, for Appellants.

W. A. Bowden, for Respondent.

HALL, J.—This is an appeal from a judgment and also from the order denying defendants' motion for a new trial.

The defendants demurred to the complaint both generally and specially, and the first point to be considered concerns the action of the court in overruling this demurrer.

Plaintiff and defendants entered into a contract June 12, 1907, for the sale by plaintiff to defendants of a crop of prunes grown in 1907. The contract is in writing, and the facts pertinent to this discussion as set out in the complaint are as follows:

“Moulton's Switch, Santa Clara Co., Cal.

“6/12, 1907.

“Received from the San Tomas Drying and Packing Co. the sum of One dollar (\$1.00) as part of purchase money for the following described fruit, viz.: The entire crop of dried Fr. prunes, season 1907, and estimated at 100 tons, and grown and dried on the orchard known as Morrell Ranch-Wrights, f. o. b. cars Wrights, tested at Wrights. Prunes to be on

the five point, with one dollar per ton to be added to basis price for each and every point that the prunes average larger than the five point, and one dollar per ton to be deducted from basis price for each and every point that the prunes average smaller than the five point. (It is understood by the five point that prunes must run 35—45—55—65—75—85—95—105—115 per pound.) All fruit to be sound and merchantable and well dried, free from slab, of choice quality and delivered f. o. b. packing house, situated on the Infirmary Road, Santa Clara Co., California, packed in sacks furnished by buyer, original condition as taken from the drying yard. . . .

“San Tomas Drying and Packing Company agrees to pay balance of purchase money as soon as the delivery is completed and sizes determined.

“Delivery to be made as directed, final delivery before Nov. 30th, 1907. . . .

“Buyers, San Tomas Drying and Packing Co.

“For account of Balfour, Guthrie & Co.

“per H. BOOKSIN, JR.

“Seller, J. B. Morrell.”

It is alleged that defendants subsequently in writing extended the time for performance by plaintiff to the first day of May, 1908; that the entire crop of dried prunes referred to in the contract amounted to 172,698 pounds, and that under the contract defendants agreed to pay therefor the sum of \$6,004.37; that plaintiff delivered to defendants and defendants accepted and received 134,132 pounds of said prunes and no more.

“That on the fifteenth day of April, 1908, the said plaintiff offered and tendered to said defendants the remainder of said prunes, viz., 38,566 pounds thereof, and then and there offered to deliver the same to the defendants according to the terms of said contract.”

That defendants refused, and ever since have refused, to accept the same or any thereof.

“That on Saturday, April 25, 1908, having first given the defendants reasonable notice of the time and place of resale, the plaintiff resold the said 38,566 pounds of prunes at public auction for and on account of said defendants for the sum of \$1,285.45, leaving a deficiency of \$870.89, no part of

which has been paid." "That the expenses attendant upon such resale amount to the sum of \$309.39, no part of which has been paid."

It is first urged that the general demurrer should have been sustained because the contract provided for delivery to be made as directed, and that the resale took place before the expiration of the time of performance given by the extension pleaded. We do not think this point well taken. The time of performance under the original contract expired November 30, 1907. Until this time arrived defendants could control the time of delivery. The extension pleaded was an extension of time for plaintiff to perform, and when plaintiff within that time offered to perform, defendants were bound to accept if in other respects the offer was in accordance with the contract. Upon defendants' refusal to accept the tendered fruit, plaintiff was justified in reselling the same.

It is also urged that it cannot be ascertained how the deficiency of \$870.80 was determined. For this reason it is separately alleged in the demurrer that the complaint is uncertain and ambiguous.

Nowhere in the complaint is there any statement as to what was the agreed price under the contract between plaintiff and defendants of the rejected 38,566 pounds of prunes. What amount defendants under the contract were obligated to pay for such rejected prunes is nowhere stated. Neither is there any general statement of damages to plaintiff in any given sum resulting from defendants' breach of contract. While it appears from the contract set out in the complaint that defendants agreed to pay a basis price of "43/4," it also appears that the actual price to be paid varied at the rate of one dollar per ton below or above such price as the prunes should vary in size below or above the size understood as the standard for the basis price. Nowhere does it even appear what size of prunes is taken as the standard for the basis price. And no attempt is made to state what sizes of prunes were tendered and rejected. So even if we assume that the words "price 43/4 basis" means 43/4 cents per pound, this only informs us that such is the price of prunes that are of the size taken as the standard for the basis price. But it also appears that this price is to be varied with the varying sizes of the prunes delivered. It is thus impossible to

determine what was the amount to be paid under the contract for the 38,566 pounds of rejected prunes. The amount to be paid for the rejected prunes is not stated in a lump sum nor at all, nor are any data given from which the amount may be ascertained by calculation.

While it is stated in the complaint that the rejected prunes were resold for \$1,285.45, "*leaving a deficiency of \$870.80,*" it is not stated that this is the deficiency or difference between the contract price and the proceeds of the resale, nor are any data given from which it can be determined that it is.

"The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: 1. If the property has been resold, pursuant to section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale." (Civ. Code, 3311.) The pleader probably intended to bring himself within this section, but has failed to show with sufficient certainty or at all that the *deficiency* referred to is the difference between the contract price of the rejected prunes and the amount for which they were resold. The court therefore erred in overruling the demurrer.

The jury returned a verdict for \$1,172.29 in favor of plaintiff, which was reduced by the court to \$1,080.19. The sufficiency of the evidence to support the verdict is attacked upon the ground, among others, that there is no evidence to show what was the amount due from defendants to plaintiff for the 38,566 pounds of rejected prunes. The plaintiff in his proof seems to have been consistent with his pleading; for while he nowhere in his pleading showed what was the amount that should have been paid by defendants for the 38,566 pounds of prunes, so in his evidence he made no proof thereof. There is no evidence in the record as to what should have been paid under the contract for the 38,566 pounds of prunes. While it is admitted by the pleadings that the basis price was $4\frac{3}{4}$ cents (?) per pound, neither the pleadings nor the evidence shows what size of prunes was taken as the standard for the basis price, and neither the pleadings nor the evidence shows what were the sizes of the prunes rejected.

As before stated, the price to be actually paid for the prunes varied from the basis price as the prunes varied in

size from the standard size taken for the basis price. Nowhere in the evidence does anyone attempt in general terms even to state what was due under the contract for the rejected prunes, and no data are given from which the amount may be determined by calculation. Where, as here, the plaintiff seeks to recover the difference between the contract price and the amount realized on a resale of personal property it is essential to prove what was due under the contract of sale as well as what was realized on the resale, in order to determine what was such difference. It is true that the record does show that the bulk of the rejected prunes were resold at a basis of $2\frac{1}{2}$ cents per pound, which is $2\frac{1}{4}$ cents less than the contract basis. But this datum is not sufficient, for we are still in the dark as to what were the sizes of the rejected prunes and what was the actual contract price therefor.

For these reasons we think that the evidence does not sustain the verdict.

As a matter of fact, the complaint in express terms alleges that the amount agreed to be paid by defendants for the entire crop sold under the contract was the sum of \$6,004.37, and the evidence shows without dispute that defendants in fact paid for the prunes accepted \$6,455.71. If the allegation is correct that the contract price of the entire crop amounted to but \$6,004.37, then the proof shows without dispute that the plaintiff has been paid more than was due him for the entire crop. The plaintiff while on the stand as a witness suggested that the allegation in the complaint was probably a mistake, but no effort was made to amend or correct the allegation.

The contract calls for prunes grown and dried on the Morrell ranch. The plaintiff was in fact working under leases three ranches, to wit, the Morrell home place, the Norton ranch and the Rhodes ranch, and the prunes in question were grown on the three places. It is claimed that the court erred in permitting the plaintiff to show by oral testimony that the term "Morrell ranch" in the contract meant the places then leased and worked by Morrell, the plaintiff. We think, however, that the court did not err in so doing. The three places were leased and in the possession of Morrell the plaintiff. The contract estimated the entire crop of dried prunes at 100 tons. The crop in fact produced on the three ranches did

not amount to that quantity. There was such an ambiguity in the contract as to authorize oral evidence to identify the subject of the contract. The evidence objected to simply proved that by the term "Morrell ranch" the parties meant the orchards leased and worked by Morrell.

Much evidence was given to the effect that the rejected prunes did not meet the requirements of the contract as to quality, but upon this point there is a conflict in the evidence. The preponderance of the evidence upon this point seems to be against the plaintiff, but this court cannot disturb the verdict of the jury for this reason.

The fact that a portion of the prunes grown on the Norton place were dried on a neighboring place does not seem to be a material variation from the requirements of the contract.

After permitting the plaintiff to prove that the rejected prunes were finally bought for the Presto Fruit Company after examination and acceptance by them, the court sustained objections to questions on cross-examination put by defendants as to what was done with the prunes, and whether or not prunes could be used in the process employed by the Presto Company that would not be suitable for shipping in boxes. In this we think the court unduly restricted the right of cross-examination. The evidence in chief was manifestly offered to support the proposition that the prunes were merchantable and complied with the contract. The weight of this evidence might have been materially affected if on cross-examination it should have been shown that the prunes in question were used in a process not requiring choice fruit.

The court erroneously instructed the jury that they might allow interest upon any amount that they might find to be due plaintiff from the date of the rejection of the prunes, if they found the rejection to have been unjustifiable.

The rule for fixing damages in such a case as this is laid down in sections 3311 and 3357 of the Civil Code. The first of those actions fixes the damages at the difference between the contract price and the net proceeds of the resale, where, as in this case, a resale is made pursuant to section 3049 of the Civil Code, and makes no provision for interest. The second section (3357) provides that "The damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned." The

two sections are in the same chapter and must be read together, and so read, clearly exclude the allowance of interest. The rule given in the instruction of the court accords with section 3287 of the Civil Code, but this section is in a different chapter from that containing sections 3311 and 3357, which are specially applicable to this case and must govern. (*Hewes v. German Fruit Co.*, 106 Cal. 441, [39 Pac. 853].)

The judgment and order are reversed, and the court below is directed to sustain the demurrer, with leave to plaintiff to amend if so advised.

Cooper, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 23, 1910.

[Civ. No. 754. First Appellate District.—April 27, 1910.]

In the Matter of the Estate of PATRICK RIORDAN, Deceased. DANIEL JAMES REARDON et al., Contestants of Will, Respondents, v. JAMES D. FITZGERALD, Proponent, Appellant.

WILL—CONTEST OF PROBATE—MENTAL UNSOUNDNESS OF TESTATOR—INSANE DELUSION AS TO FACTS RESPECTING CHILDREN.—If a testator, against all evidence and probability, believed supposed facts respecting his children, which had no existence except in his perverted imagination, and conducted himself, however logically, upon the assumption of their existence, he is, so far as such facts are concerned, under an insane delusion; and if he was the victim of such a delusion when he executed his will cutting off his children with one dollar each, and if the provisions of the will were caused by such delusion, the instrument is not his will, and its probate may be contested by such children for the mental unsoundness of the testator.

ID.—INSANE DELUSION NOT PROVED—VERDICT OF UNSOUND MIND AGAINST EVIDENCE.—Where no witnesses other than the interested children assailed the testamentary capacity of their father, and twenty disinterested witnesses intimately acquainted with him testified to his mental soundness, and the evidence of the children was mainly addressed to his harsh and cruel treatment of them

and of their mother prior to her divorce from him twenty-two years before his death, wherein he settled upon her the greater portion of his property, and the children sided with their mother, and for many years prior to their father's death had no relations with him and avoided and refused to speak to him, and there is no evidence tending to show an insane delusion respecting them, and it was proved that his will was his voluntary and intelligent act, a verdict that he was of unsound mind when it was executed is against the evidence.

ID.—BAD TEMPER NO PROOF OF INSANE DELUSION.—A person may have a bad temper, and under its influence may say and do wrong and unnatural things, and still not be laboring under an insane delusion as to the objects of his hostility.

ID.—PREJUDICES, ANTIPATHIES AND DISLIKES NOT DESTROYING TESTAMENTARY POWER.—Prejudices, antipathies, and dislikes, however ill-founded or however strongly entertained, cannot be classed as an insane delusion. People may hate their relations for bad reasons, and yet not be deprived of testamentary power.

ID.—BELIEF AGAINST CHILDREN NOT WITHOUT REASON.—Whatever belief or opinion the testator entertained toward his children when the will was made, the record does not show there was no reason therefor, or that he adhered to it against all evidence and argument. If the deceased had, after the divorce was granted to the wife, who obtained the largest part of the property, made a will disinheriting the children who sided with their mother, as to the residue of his property, it could not be said to be without reason, and in view of their subsequent course of conduct, his last will, so far from being the result of insanity, was a very natural thing to do.

ID.—BELIEF NOT UNCHANGEABLE FOR PROPER REASON.—It does not appear that he could not have been reasoned out of his belief, upon a changed course of conduct of his children. Where the testator's belief is not so fixed that he could be reasoned out of it, it will not be held to be a delusion.

ID.—RESIDENCE WITH NEPHEW—ABSENCE OF UNDUE INFLUENCE.—Where, for many years, the testator had resided with a nephew, and had, without suggestion, showed a strong disposition to leave the bulk of his estate to his nephew and his son, and his last will was made six years before his death, and when he was in robust health, and was made without suggestion from anyone, as his voluntary act, free from any suspicious circumstances, and the persons named were the natural objects of his bounty, a verdict that the will was procured by the undue influence of the nephew is against the evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, denying probate of the

will of a deceased person, and from an order denying a new trial. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Frank J. Hennessy, Stafford & Stafford, and W. P. Cauby, for Appellant.

Wm. M. Cannon, for Respondents.

KERRIGAN, J.—This is an appeal from a judgment denying probate to the will of deceased, and from an order denying appellant's motion for a new trial.

Patrick Riordan was born in Ireland, and came to California in 1849. He married in San Jose, and there settled on a ranch. His first child was born in 1862, and during the succeeding sixteen years he became the father of twelve children, nine of whom are still living. Upon an original investment of \$8,000 he had in the year 1885 accumulated property of the value of \$45,000. In that year his wife secured a divorce from him on the ground of his extreme cruelty, and at the same time they agreed upon a division of the community property. Of the ranch, consisting of two hundred and thirty-one acres, she received one hundred and fifty-one acres, and he eighty acres, and the cattle thereon were divided equally between them. Thereafter Patrick Riordan moved a barn or granary from another part of the ranch to within about two hundred yards of the Riordan family home, and resided in it for more than two years, thereafter making his home in San Jose and San Francisco until the time of his death.

He executed his last will on July 6, 1901, and he died in San Francisco on July 6, 1907. By his will he gave to each of his nine children the nominal sum of one dollar, and in explanation thereof he stated, "I give my children no more because they have lived apart from me and for other sufficient reasons not here given." To each of two nieces residing in Ireland he bequeathed \$2,000. He gave to his nephew James D. Fitzgerald, in trust for the latter's minor son, James R. Fitzgerald, a certain piece of improved real property situated in San Francisco. He nominated James D.

Fitzgerald executor of his will, and bequeathed to him the residue of his estate.

When this will was offered for probate it was contested by the children of the decedent, who alleged that their father was of unsound mind and under the undue influence of James D. Fitzgerald when he made the same. The jury found on both of these issues in favor of the contestants. Upon the verdict judgment was entered denying probate to the will. A motion for a new trial was duly made, and denied.

The evidence shows that in 1887 decedent sold his share of the ranch and went to live in San Jose. In 1889 he visited Ireland, and some two years later made a second visit to that country. From the year 1887 until his death he engaged in no regular business, although he bought some real property and occasionally loaned money on security, attending personally to all his own affairs. He went when and where and with whom he pleased. He was a man of intelligence, but very set in his views. He always enjoyed good health until in July, 1907, when he was taken ill with pneumonia, and died after an illness of about six days, being at that time eighty-five years of age.

From 1887 until his death—a period of twenty years—he made his home with the family of Dr. James D. Fitzgerald, his nephew.

The proponent of the will called twenty-four witnesses, intimate acquaintances of the deceased, all of whom testified that he was of sound mind.

The contestants admitted that their father was a sober and industrious man; that he provided them with a good home up to the time of the separation from his wife, when they remained with her; that he sent them to school, visited them there, and attended church every Sunday with his family. They also testified that he was a successful and perfectly sane man in every regard, with the single exception that he entertained an insane delusion as to his children.

If a person, against all evidence and probability, persistently believes supposed facts which have no existence except in his perverted imagination, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under an insane delusion. (*Estate of Scott*, 128 Cal. 62, [60 Pac. 527]; *Estate of Ken-*

drick, 130 Cal. 364, [62 Pac. 605]; *Estate of Redfield*, 116 Cal. 652, [48 Pac. 794].) If the testator was the victim of a delusion, as thus defined, in respect to his children at the time he executed his will, and the provisions thereof were caused or affected by such delusion, the instrument is not his will.

Seven of the contestants testified at the trial that at the time of the separation of their father and mother in 1884, he was of unsound mind as to his children, basing their opinion upon his harsh and cruel treatment of them. He had an ungovernable temper, and would often become enraged at the children, at such times inflicting upon them, or attempting to do so, the harsh and cruel treatment complained of.

Their testimony is substantially as follows: Several times quarrels with one of the children would involve the whole family, and the mother with the children would run out of the house, and while they were outside the decedent would walk up and down the floor with a light in one hand and a club, or some similar instrument, in the other, muttering to himself. When he would retire for the night, at about 2 o'clock they would crawl through the window into one room, and there the boys would sleep on the floor and the mother and the girls on a bed. At times for some reason or other, and again without apparent reason, he would hit or attempt to hit one or other of his children, or he would swear at them, the term generally employed being "You damn scoundrel." On one occasion his son Thomas, who was helping his father catch some horses, permitted them to get away. This angered the decedent, and he called the boy a "damn scoundrel." Thomas ran away and his father pursued him into a bedroom where Mrs. Riordan was, and then addressing Mrs. Riordan he said, "You damn scoundrel, is that what you are doing?" and he attempted to hit her with a black-snake, but missed her and cut the window curtain. Thereupon the "mother ran out, and all the folks ran into the yard." On another occasion, upon being informed that the children wanted some books, Riordan hit his eldest son over the back with a rope doubled, threw him against the wall, and said, "You damn scoundrel, it's books you want. I will give you books." He also seized a pitchfork and chased his son into the house. One day at the table his daughter Mary

asked for sugar, and he became angry, and when Mrs. Riordan tried to quiet him he struck her on the temple with a brass candlestick. On another occasion a daughter asked for butter, whereupon he grabbed a plate to throw at her, Mrs. Riordan interfered and he struck her on the nose.

It would be tedious to detail further the testimony. However, it is proper to state that there were a number of instances somewhat similar to those just detailed. The children also claimed that their father showed them no paternal affection, and that they were afraid of him. After 1884, and while the decedent was living in the barn, on several occasions he pointed his finger at the children and swore at them, and also on other occasions stated that the loss of his eye (which was removed in 1892) was caused by one of his sons.

For the purpose of showing that the condition of mind of the testator as disclosed by these incidents continued to exist down to the time the will was executed, seventeen years later, the contestants rely on some deeds, transfers of bank accounts and three wills, including the one in question, by which acts the decedent gave all or nearly all of his property to the Fitzgeralds, and thereby showed, as they claim, a persistent and fixed desire to prevent them from receiving any of his estate.

Not a witness other than the children testified that the decedent was without testamentary capacity; and ignoring the remoteness of this testimony, and assuming that the condition of mind of the decedent toward his children in 1885 was shown to exist in 1901 when the will was made, still we think the testimony only disclosed that the deceased was harsh and cruel and was afflicted with an ungovernable temper, and that it utterly fails to show that he was laboring under any insane delusion. A person may have a bad temper, and under its influence say and do wrong and unnatural things, and still not be laboring under an insane delusion as to the objects of his hostility.

In *Estate of Kendrick*, 130 Cal. 364, [62 Pac. 607], it is said: "Prejudice, dislikes and antipathies, however ill-founded, or however strongly entertained, cannot be classed as insane delusions, nor is every delusion an insane delusion."

In the case of *In re Spencer*, 96 Cal. 452, [31 Pac. 454], it was said: "The likes and dislikes of human beings—their confidences and mistrusts—are often capricious and arbitrary; but they are not evidence of insanity because they cannot be logically defended to the satisfaction of those who think them wrong. In the case at bar there is no warrant for the claim that the testatrix's dislike of her daughter in law and her family was an insane delusion; it was simply such a feeling, arising out of the recondite principles of attraction and repulsion, as is quite common among people of undoubted sanity."

In *Estate of Carpenter*, 94 Cal. 419, [29 Pac. 1105], Judge Temple observes: "People may hate their relations for bad reasons, and yet not be deprived of testamentary power."

In *Weston v. Hanson*, 212 Mo. 248, [111 S. W. 44], although it was claimed that the testator was of unsound mind, the will was upheld. The court in so holding said: "We are not to lose sight of the fact that the testator's brutal treatment of his wife, as shown by the evidence in this case, is not one of the tests of testamentary capacity, for a man may be unkind and brutal in his treatment of his wife, and yet have capacity to make a will."

In *Commer v. Skaggs*, 213 Mo. 334, [111 S. W. 1132], where the will was upheld, the testator disinherited his daughter because she married against his wishes. We quote from that case: "Many witnesses testified to Mr. Skaggs' exceeding and sore bitterness over this event, and for some time he did not speak of it without falling into a very ecstasy of rage, sometimes accompanied by such physical phenomena as 'foaming at the mouth,' 'pawing the grass,' and cursing and swearing. The record makes it clear that in the height of his bitterness he determined to disinherit his disobedient daughter. He told others he would do so. Accordingly, on the twenty-eighth day of February (the month of the marriage), the will in contest was executed, doing that very thing. . . . The resentment of the father was most human and natural though extravagantly exhibited. That he did not rise to the lofty and divine plane of complete forgiveness when time had healed his wounds is unfortunate, but is still natural and human—not insanity."

In *Schneider v. Manning*, 121 Ill. 381, [12 N. E. 269], the court says: "A man may become prejudiced against some of his children, and that too without proper foundation; and because he may make unjust remarks about them—remarks not warranted by the facts—it does not follow that he has insane delusions, or that he is devoid of testamentary capacity."

Whatever belief or opinion the testator may have entertained against the children when the will was executed, still the record fails to show that there was no reason for such belief or opinion, or that he adhered to it against all evidence and argument. In 1884 he and his wife were separated, and in 1885 they were divorced. The dates of the different acts of cruelty toward the children are not stated, but, basing their opinion upon these acts, those of the children who testified on the subject gave it as their opinion that the testator was of unsound mind in the years 1884 and 1885. Presumably the trouble between the testator and his wife had much to do with his exhibitions of temper. Riordan doubtless felt compelled to, and indeed did, make a generous division of his property with his wife. In this trouble the children sided with their mother, and if the decedent had made his will in 1885 disinheriting his children, it certainly could not be said that such act was without reason; much less could it be said of such a will made sixteen years later, the children in the meantime having reached adult age, and their path in life having made them and their father strangers. Indeed, conceding the right of testamentary disposition, it is difficult to understand how the children could have expected their father to make any testamentary disposition in their favor. After the year 1884 none of them ever called upon him or wrote to him; they ignored him then, and they continued to ignore him for twenty-two years and down to the time of his death. When any of them met him on the street they crossed to the other side or passed him by without speaking. Doubtless some of his children would have been unable to recognize him if brought face to face, or he to recognize some of them. They did not inform him of the death of their mother, which occurred in 1905. Their conduct showed clearly that they did not care for their father; and

while, in disinheriting them, he may not, as counsel says, have set an example of Christian charity, still so far from such course being the result of insanity it strikes us as a very natural thing to do. "Where it appears that testator's belief is not so fixed that he could be reasoned out of it, it will not be held to be a delusion." (*Skinner's Will*, 40 Or. 571, [62 Pac. 523, 67 Pac. 951].)

Little need be said on the question of undue influence. The decedent had shown for years a desire to leave the principal part of his estate to the Fitzgeralds. As before remarked, Riordan was a man of considerable intelligence with very fixed opinions, and no doubt it would have been difficult, if not impossible, to persuade him how to dispose of his property. He made three wills, and in each of them he practically disinherited his children. His last will was not a death-bed will made by a feeble old man, but it was made six years before his death and when he was in robust health. It was made without suggestion from anyone; in brief it was made free from any suspicious circumstances. Finally, we think nothing was more natural than that the decedent should have bequeathed his estate, as he did, to the Fitzgeralds with whom he had made his home for many years. They were the natural objects of his bounty.

For these reasons we think the verdict is not supported by the evidence. The judgment and order are reversed.

Cooper, P. J., and Hall, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 25, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 25, 1910.

[Crim. No. 115. Third Appellate District.—April 27, 1910.]

**THE PEOPLE, Respondent, v. DANIEL CROWLEY and
FRANK WILSON, Appellants.**

CRIMINAL LAW—ROBBERY—PRELIMINARY EXAMINATION—RIGHT OF ACCUSED TO COUNSEL—SUFFICIENT INSTRUCTION.—Where defendants charged with robbery were, upon their preliminary examination, informed, as soon as the complaint was read, that each of them had the right to a preliminary examination, and the right to procure counsel, and the right to be admitted to bail pending the examination, they were sufficiently instructed as to their rights.

ID.—WAIVER OF RIGHT TO COUNSEL.—When the defendants were informed of their right to procure counsel, if they so desired, they should have asked for time in which to procure the same; and where, instead of doing so, upon their being asked when they would be ready to proceed with the examination, they answered: "We will be ready at any time," they thereby waived their right to procure counsel.

ID.—STATUTORY PROVISION AS TO PROCURING COUNSEL—REQUEST BY DEFENDANT ESSENTIAL.—The statute does not require the magistrate to appoint counsel at a preliminary examination, but merely provides that "upon the request of the defendant" the magistrate must "require a peace officer to take a message to any counsel in the township or city the defendant may name."

ID.—EVIDENCE—CRIMINAL ATTEMPT TO ESCAPE—PREVENTION BY OFFICER.—Evidence was admissible as tending to show a criminal attempt to secure the escape of the defendants and its prevention by an officer, proving that while defendants were in the county jail when the arresting officer opened the door to let an attendant pass in with their meals, one of the defendants with a gun in his hands immediately commanded the officer to throw up his hands, that the officer closed the door as far as possible and seized the gun, and drawing his own pistol sent a shot through defendant's body, which killed the attendant.

ID.—EVIDENCE—COMMISSION OF ANOTHER CRIME—RELEVANCE TO ISSUE. Though the commission of another crime than the offense charged may not be proved for the sole purpose of showing that the defendant would be more likely to have committed that charged, yet if the evidence of another crime is material and relevant to the issue, the mere fact that it tends to establish guilt of a crime other than the one alleged furnishes no ground for its rejection.

ID.—ATTEMPT TO ESCAPE A PROPER SUBJECT OF PROOF.—An attempt to escape is always a circumstance proper to be shown and considered by the jury.

ID.—ARREST FOR FELONY WITHOUT WARRANT NOT JUSTIFYING ATTEMPT TO ESCAPE.—Defendants charged with a felony may be arrested by a peace officer without a warrant, and the fact that the defendants charged with robbery were arrested by such an officer without a warrant and confined in the jail did not justify their attempt to escape on the morning following their arrest and confinement therein.

ID.—SUFFICIENCY OF EVIDENCE OF ROBBERY.—Where two eye-witnesses testified to having seen the defendants in the act of "going through" their victim, and watched them until they came past them into the light, where they were plainly seen, and that upon finding the peace officer they pointed out the defendants, who were arrested by him, the evidence is sufficient to sustain the verdict.

ID.—DISCRIMINATION IN SEVERITY OF SENTENCES.—Where one of the defendants appeared more culpable than the other and yet received no heavier punishment than he deserved, neither of the defendants can complain that the other defendant received a less sentence than he deserved.

ID.—VENUE OF OFFENSE.—*Held*, that the venue of the offense was sufficiently and distinctly proved.

ID.—INSTRUCTIONS AS TO ATTEMPT TO ESCAPE.—*Held*, that the court fairly, fully, and correctly stated the law as to the effect of an attempt to escape by a prisoner who is arrested for a felony, as a circumstance to be considered by the jury as bearing upon the consciousness of guilt of the offense charged against him.

APPEAL from a judgment of the Superior Court of Nevada County, and from an order denying a new trial. George L. Jones, Judge.

The facts are stated in the opinion of the court.

George B. Finnigan, for Appellants.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

CHIPMAN, P. J.—Defendants were convicted upon an information charging them jointly with the crime of robbery. Defendant Crowley was sentenced to imprisonment at Folsom for the term of twenty years and defendant Wilson was sentenced to imprisonment at San Quentin for the term of fifteen years. Defendants appeal from the judgment and from the order denying their motion for a new trial.

1. The first point made by appellants is that the court erred in denying defendants' motion to set aside the information, for the reason that at the preliminary examination, they "were not fully informed of their rights by the magistrate as to their right to counsel." (Citing Pen. Code, sec. 858.) Conceding that the failure of the magistrate to comply with the provisions of said section is cause for setting aside the information (*People v. Naphaly*, 105 Cal. 643, [39 Pac. 29]), we think the record shows sufficient compliance therewith. The following proceedings took place before the magistrate: "The Court. Q. What is your name? A. Dan Crowley. Q. What is your name? A. Frank Wilson. There is a complaint filed in this court charging you with a felony. The district attorney will read the complaint. The complaint was then read by Mr. Rutherford. The court then said 'You and each of you have a right to a preliminary examination, and the right to procure counsel and the right to be admitted to bail, pending the examination. When will you be ready to proceed with the examination?' To this the defendants replied 'We will be ready at any time.'

"The Court. 'Mr. Rutherford, what time?'

"Mr. Rutherford. 'Two o'clock this afternoon.'

"The Court. 'Very well. In the mean time you will be held in bonds of \$8,000, to appear here at two o'clock this afternoon for examination. You will be in the custody of the officer until you give such bail. It is ordered that you attend at the coroner's inquest as witnesses.' "

Having been thus informed of their rights they should have asked time in which to obtain counsel, if they so desired. Instead, however, they answered, when asked when they would be ready to proceed with the examination, "We will be ready at any time." The statute does not require the magistrate to appoint counsel on the request of defendant, at the preliminary examination, as is the case upon his arraignment (Pen. Code, sec. 987); but provides that "upon the request of the defendant, require a peace officer to take a message to any counsel in the township or city the defendant may name."

2. Error is assigned in that the court permitted proof to be made of "the commission by defendants of another crime, separate and distinct from the one on which they were being

tried and committed after it." While defendants were in jail Constable Schumpf went to the prison with a young man named King, the latter carrying with him the breakfast for the prisoners confined in the jail, there being others besides the defendants. The evidence showed that after the constable had opened the door leading to the prisoners, defendant Wilson stood beside defendant Crowley near the door. Schumpf testified: "I opened the large padlock and opened the swinging door. I unlocked that and pulled it back and opened the door and I stepped inside the door here. It swings to my right and I stepped outside of the door to let the young man pass in with the tray of meals. He no more than got inside than Crowley stepped up to me and he says 'Throw up your hands.' He stepped up to me like this, and he says 'Throw up your hands,' and I made the remark 'Go to hell,' and I tried to throw the bolt against the door and he threw the gun against me like that. The door was open and I could not close the door; the door was open about two feet and a half, and I hollered for help; I cried for help, and I made a grab for his gun and caught it." It appeared further that Schumpf drew his own gun and shot Crowley, the ball passing through his body and killing King. The facts relating to this encounter and its regrettable result came out in connection with the attempt of defendants to make their escape and for that purpose alone. The evidence was admissible. In *State v. Wrand*, 108 Iowa, 73, [78 N. W. 789], a somewhat similar case, the court said: "The sheriff detected the defendants, while in jail, attempting to escape by sawing the iron bars of their cell. They insist that evidence of this was inadmissible, because tending to prove a distinct offense. True, the commission of another crime may not be proven for the sole purpose of showing that the defendant would be the more likely to have committed that charged. (*State v. Rainsbarger*, 71 Iowa, 746, [31 N. W. 865]. See *State v. Brady*, 100 Iowa, 191, [62 Am. St. Rep. 560, 69 N. W. 290].) But, if the evidence is material and relevant to the issue, the mere fact that it tends to establish guilt of a crime other than the one alleged furnishes no ground for its rejection. (*People v. Place*, 157 N. Y. 584, [52 N. E. 576].) That an attempt to escape is a circumstance proper to be shown and considered by the jury is put

beyond controversy by the authorities. (*State v. James*, 45 Iowa, 412; *State v. Arthur*, 23 Iowa, 430; *State v. Ruby*, 61 Iowa, 86, [15 N. W. 848]; *State v. Stevens*, 67 Iowa, 558, [25 N. W. 777].)''

The fact that defendants were arrested and confined without warrant did not justify their attempt to escape. A warrant of arrest was not necessary, the crime for which they were arrested being a felony. The arrest was made late on Saturday night, July 3d, and the occurrence above mentioned took place the next morning.

3. It is claimed that the evidence was insufficient to justify the verdict. Two witnesses testified to having seen defendants in the act of "going through" their victim and watched them until they came past the witnesses where it was light, saw them both plainly and at once looked up Constable Schumpf and with him found the men shortly afterward. The evidence was ample to warrant the verdict.

4. It is urged that "the sentences imposed were excessive and disproportionately severe in light of the crime committed." The crime consisted of waylaying and assaulting a somewhat intoxicated old man and severely injuring him and while prostrated on the ground, robbing him of all the money he had—"three five dollar gold pieces" and "a silver cased watch." There was evidence tending to show that defendant Crowley was the more culpable and got no more than he deserved and that Wilson got less is not matter of which either can complain.

5. It is claimed that the venue was not proven. In this defendants are mistaken. There was evidence that the crime was committed in the town of Truckee and in the county of Nevada.

6. It is also urged that "the instructions of the court to the jury were unfair to the defendants; more especially for the reason that the court assumed that the defendants had been legally arrested and charged with crime, and made an attempt to escape." The court instructed the jury as to the statute law under which a peace officer may make an arrest, but went no further in its instruction. The court also instructed the jury that an attempt to escape by one under arrest, accused of crime, "is a circumstance to be weighed by the jury as tending in some degree to prove consciousness of

guilt, and entitled to more or less weight, according to the circumstances of the particular case. In this particular case, whether or not the defendants did attempt to escape from the jail at Truckee after being placed therein by the officers and whether, if any attempt was so made, such attempt tends in any degree to show a consciousness of guilt of the crime alleged in the information are matters for you to decide." And the court instructed the jury that the acts surrounding the alleged attempted escape are to be considered by you for one purpose only, namely—whether or not they proceeded from a consciousness of guilt, on the part of defendants or either of them, of the crime alleged in the information.

We discover no error in these instructions.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 23, 1910.

[Crim. No. 129. Third Appellate District.—April 27, 1910.]

THE PEOPLE, Respondent, v. JOHN REESE, Appellant.

CRIMINAL LAW—MANSLAUGHTER—APPEAL TAKEN PRIOR TO CODE AMENDMENT—WRITTEN SERVICE OF NOTICE ESSENTIAL.—Where the judgment convicting appellant of manslaughter, and the order denying him a new trial were rendered prior to the taking effect of the amendment to the Penal Code allowing an oral notice of appeal, the only method of taking the appeal to this court from such judgment and order was by the service and filing of a written notice of appeal.

Id.—EFFECT OF FAILURE OF APPELLANT TO APPEAR.—Where the appellant has filed no brief or points and authorities, this omission would alone be sufficient to justify the dismissal of the appeal, if one had been taken.

Id.—WANT OF JURISDICTION OF APPEAL—CERTIFICATE OF CLERK OF SUPERIOR COURT—TRANSCRIPT STRICKEN FROM FILES.—Where the clerk of the superior court certifies that no written notice of appeal is on file in that court, and that no notice of appeal of any kind

in this case is found upon its records, it clearly appears that appellant has failed to pursue the course required when the judgment and order appealed from were rendered, and that this court is without jurisdiction to review the record filed here, and it will order the transcript to be stricken from the files of the court.

ORDER striking out transcript on appeal from a judgment of the Superior Court of Siskiyou County, and from an order denying a motion for a new trial. J. F. Lodge, Judge.

B. K. Collier, and Beard & Beard, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

HART, J.—The defendant was convicted of the crime of manslaughter under an information charging him with the crime of murder.

The transcript does not show that an appeal has been taken from either the judgment or the order denying defendant's motion for a new trial.

A certificate of the clerk of the trial court, on file in this court, discloses "that there never has been, nor is there now, any written Notice of Appeal in said case of the People of the State of California vs. John Reese, Defendant, entered in the Clerk's Register in my office, and that no Notice of Appeal of any kind whatever is to be found in any of the records or papers in said case of the People of the State of California vs. John Reese, Defendant, in my office."

Judgment in this case was pronounced on May 12, 1909, and, as section 1239 of the Penal Code (Stats. 1909, p. 1086), which provides that an appeal from a judgment in a criminal case may be taken by the defendant "by announcing personally or through his attorney in open court *at the time the judgment is rendered* that he appeals from the same," did not go into effect until June 21, 1909, it is very plain that the defendant, in order to have succeeded in taking an appeal, should have served and filed a written notice of the same, as prescribed by section 1240 of the Penal Code, as that section read prior to the change in the method of taking appeals in criminal cases. Having failed to pursue the course prescribed for appealing from the judgment at the

time judgment was rendered against him, this court is without jurisdiction to review the record filed here.

There is in fact no appeal here in any sense of the proposition, for there is not any evidence of even an attempt to take an appeal, while, on the contrary, the certificate of the clerk of the court below shows, as we have seen, that there is nothing in the records of the cause disclosing that any attempt was made to take any appeal whatsoever.

The appellant has not filed a brief, or points and authorities, and this omission would alone be sufficient to justify the dismissal of an appeal, if one had been taken. (Rule 5, supreme court.)

From the foregoing, it is clear that there is nothing left for this court to do but to order the transcript or record herein stricken from the files of this court, and such is the order.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 726. Third Appellate District.—April 27, 1910.]

**COLUSA MILLING COMPANY, Respondent, v. DRAPER
DRAY AND STORAGE COMPANY, Appellant.**

**APPEAL—ALTERNATIVE METHOD—SERVICE OF NOTICE—DEFECTIVE BOND
—JURISDICTION—MOTION TO DISMISS.**—Although an appeal seems to have been attempted under the former method by service of the notice and the filing of a defective bond, yet since, under the alternative method, no bond is required to give this court jurisdiction of the appeal, it cannot be dismissed on motion for mere insufficiency of the bond.

ID.—DISMISSAL FOR NEGLECT TO FILE TRANSCRIPT IN TIME.—Under rules II and V of this court, if the appellant in a civil action has, without excuse, failed to file the transcript within forty days after the appeal is perfected, the respondent is entitled upon motion, after notice given, to have the appeal dismissed.

MOTION to dismiss an appeal from a judgment of the Superior Court of Colusa County and from an order denying a motion for a new trial. H. M. Albery, Judge.

The facts are stated in the opinion of the court.

Ernest Weyand, for Appellant.

Thomas Rutledge, for Respondent.

CHIPMAN, P. J.—It appears that judgment was made and entered in the above-entitled cause on November 30, 1909, in favor of plaintiff for the sum of \$557.50, with interest at the rate of seven per cent per annum from said date, together with costs taxed, \$63.62; that on December 13, 1909, defendant moved to vacate and set aside said judgment and on said last-mentioned date the court made and entered its order denying said motion; that on January 29, 1910, defendant filed in said court its notice of appeal to this court from said judgment and order, which said notice of appeal was duly served upon plaintiff, on January 29, 1910; that “no statement on appeal or bill of exceptions has been made, settled or filed in said cause”; that no proceedings are pending for the settlement of any proposed statement or bill of exceptions in said cause, and that appellant has not requested the clerk to certify to a correct or any transcript. Defendant also claims that the undertaking is defective in certain essential particulars.

The grounds for the motion to dismiss the appeal are:

1. That no sufficient undertaking on appeal has been given by appellant;
2. That no transcript of the record in said cause has been made or filed in this court.

No bond on appeal was required to give this court jurisdiction. (*Mitchell v. California etc. S. S. Co.*, 154 Cal. 731; *Russell v. Banks*, 11 Cal. App. 450, [105 Pac. 261].)

Rule II requires the transcript in a civil action to be filed within forty days after the appeal is perfected, except under certain circumstances not here made to appear. Rule V provides that the appeal may be dismissed on motion, upon notice given, if the transcript be not filed within the time prescribed.

The appeals from the judgment and order are dismissed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 771. Second Appellate District.—April 28, 1910.]

ROBERT DOLLAR, Respondent, v. THE INTERNATIONAL BANKING CORPORATION, Appellant, and EDWIN H. LAMME, Codefendant.

ACTION BY ASSIGNEE OF BANK DEPOSIT RECEIPT—NON-NEGOTIABLE INSTRUMENT—EFFECT OF ASSIGNMENT.—A bank deposit receipt for money locally deposited by an American Commercial Company with an International Banking Company doing business at Hongkong, repayable there with interest at five per cent, to remain until twelve months' notice on either side expires, to be paid on return of the receipt properly indorsed by the depositors, and stamped "not transferable," is a non-negotiable instrument, under the law-merchant, but is assignable, though the assignee obtains no better title to the instrument than his indorser, notwithstanding it was indorsed to him before maturity.

Id.—DEMAND OF PAYMENT AT HONGKONG—REFUSAL—ACTION IN THIS STATE.—Where payment of the note was demanded in Hongkong by the assignee of the instrument, and payment was there refused, an action may be maintained against the International Banking Company in this state, where it has an office here, and enters an appearance and questions the sufficiency of the complaint.

Id.—IMPORTANCE OF PROPER DEMAND.—Whether or not proper demand was made at the place of payment becomes important in determining the right to bring the action in a court of this state, as well as in ascertaining upon what basis the value of the money so deposited is to be fixed, if plaintiff is entitled to recover.

Id.—INDORSEMENT TO PLAINTIFF'S ASSIGNOR—PAYMENT OF ASCERTAINED DEBT OF PAYEE—JUDGMENT OF CONSULAR COURT.—Where the indorsement of the payee to plaintiff's assignor was in consideration of the payment of an indebtedness of the payee to the assignor, the judgment of a consular court establishing the debt established nothing more than that the corporation payee was indebted to the first assignor in the sum named in the judgment, upon payment of which the corporation payee made the indorsement.

Id.—INEFFECTIVE SUPPLEMENTAL DECREE—ATTEMPT TO TRANSFER TITLE.—A so-called supplemental decree of the consular court, attempting to transfer the title of the corporation payee to the debtor, was ineffective for that purpose, and did not affect the contract between that company and the banking corporation appellant.

Id.—EQUITABLE ESTOPPEL NOT PLEADED.—An agreement made between the manager of the banking corporation and the creditor of the payee that if he obtained a judgment against the corporation payee

for an amount equal to or greater than the debt of the banking corporation therein, and the debt was applied upon it, the banking corporation would make payment of the certificate to such satisfied creditor on presentation, was based upon an equitable estoppel, which is not available unless pleaded.

Id.—BASIS OF RECOVERY.—If plaintiff, as assignee of such first assignee, recover in the action, he must do so on the theory of the enforcement of the express contract made with the managing agent of the corporation payee, or the implied contract made by said corporation with the depositor.

Id.—FINDINGS ON SECOND DISMISSED CONSULAR ACTION NOT CONCLUSIVE.—It is held that findings in a second consular action dismissed without prejudice to a new action were conclusive upon neither party, there being no finding that it was rendered for want of authority accompanying the presentation of the certificate by the plaintiff's assignor.

Id.—TESTIMONY SHOWING AUTHORITY OF MANAGING AGENT OF PAYEE IN CHINA.—Where the testimony clearly establishes that the vice-president of the corporation payee was its managing agent in China and transacted all its business therein, created debts against the company and paid them in its name, and that no other person acted as its agent in China, such managing agent was authorized to collect the debt, or to make an assignment thereof in payment of the company's debt to an assignee, as such manager.

Id.—CONCERN OF DEFENDANT BANK.—The defendant banking corporation is concerned only in knowing that the assignment of the evidence of debt or chose in action against it is of such character as to bind the assignor payee.

Id.—INCOMPETENT ORAL CONTRACT WITH PAYEE.—The incompetency of parol evidence to vary a writing may be considered as matter of law, though admitted without objection; and if the American Commercial Company, by its general manager, had itself presented the deposit receipt and demanded payment, no compliance with an oral contract that the managing agent should produce a resolution of the board of directors could have been made by the defendant a condition precedent to payment of the deposit to such manager.

Id.—AUTHORITY OF MANAGING AGENT TO MAKE ASSIGNMENTS.—Where the managing affairs of a corporation are intrusted to a general managing agent, he has power to transfer the chose in action of the corporation to its creditors, either in payment or as security for a pre-existing debt of the corporation, without express authority from the board of directors, and an assignment so made is valid.

Id.—PRESUMED AUTHORITY OF MANAGING AGENT—EXPRESS AUTHORITY NOT NECESSARY.—The presumption is that such assignment was made by competent authority. No special resolution authorizing him to act in this respect was necessary.

ID.—OSTENSIBLE AGENCY.—An ostensible agency is created when the principal intentionally or by want of ordinary care authorizes a third person to believe another to be his agent, even if not really employed by him. The authority of such an agent is such as the principal allows such person to believe the agent to possess.

ID.—GOOD FAITH OF CREDITOR PERFORMING SERVICES FOR PAYEE, AT REQUEST OF MANAGING AGENT.—Where there is no question of the good faith of the first assignor of the bank deposit in doing services for the corporation payee, at request of its managing agent, or in taking a receipt of its indebtedness in full payment of the bank certificate, he thereafter stood in the shoes of the American Commercial Company as the owner of the paper, subject only to such equities as the bank might set up against the company payee itself.

ID.—ORAL CONTEMPORANEOUS AGREEMENT AS TO PROOF OF AGENT'S AUTHORITY NOT BINDING ON ASSIGNEE.—The oral contemporaneous agreement between defendant and the agent of the corporation payee as to proof of his authority, not being binding upon the payee, can constitute no defense to the action of the assignee of the payee, or his successor in interest.

ID.—ACQUITTANCE BY ASSIGNEE PROTECTION TO BANK.—The acquittance by the *bona fide* assignee of the corporation payee would be a sufficient defense in favor of the banking corporation defendant to any subsequent demand upon the bank by the corporation payee.

ID.—CONTEMPORANEOUS ORAL AGREEMENTS BETWEEN PARTIES TO WRITTEN CONTRACT FOR MONEY.—Contemporaneous oral agreements between the parties to a written obligation to pay money, as to the manner of the negotiation, cannot be set up as a defense against payment of the money under the contract in an action by the payee or his assignee.

ID.—RULE AGAINST VARIATION OF WRITTEN CONTRACTS BY PAROL EVIDENCE—APPLICABILITY TO NON-NEGOTIABLE PAPER.—Such oral agreements come under the rule that written contracts cannot be varied by parol agreements, and this rule is applicable to such agreements, irrespective of whether the instrument be negotiable or non-negotiable.

ID.—INCOMPETENCY OF PAROL EVIDENCE DISTINGUISHED FROM SECONDARY EVIDENCE.—The rule that incompetent parol evidence to vary a writing can have no legal affect, though proved without objection is to be distinguished from the rule as to secondary evidence.

ID.—AUTHORITY OF MANAGING AGENT—NEGATIVE AND POSITIVE PROOF. The failure of the corporation payee to object at any time to the authority assumed by its managing agent in China, and the absence of any proof by the defendant that he lacked such authority, taken in connection with the positive proof that he was such managing agent, and exercised all the authority of the corporation

payee in China, together constitute competent proof of his authority as such managing agent.

ID.—TESTIMONY TO AUTHORITY OF AGENT—INFERENCES—FACTS STATED—APPELLANT NOT PREJUDICED.—Where the assignee of the payee, in testifying to the authority of the managing agent, made statements in the nature of conclusions or inferences, but these were accompanied by a statement of the facts from which the inferences were drawn, it cannot be said that such inferences objected to could have been prejudicial to the appellant's case before the trial court.

ID.—DEMAND REGULARLY MADE BY ASSIGNEE—DAMAGES—INTEREST.—The demand having been regularly made by the first assignee at Hongkong, the damages for failure to pay are to be computed under the rule declared in subdivision 1 of section 3336 of the Civil Code, which would entitle the plaintiff to the market value at Hongkong when payment was refused, with interest, as allowed in the judgment.

ID.—INDEMNITY BOND NOT REQUIRED UPON LOSS OF NON-NEGOTIABLE INSTRUMENT.—The rule in courts of equity that a bond will be required upon a lost instrument has well-recognized exceptions, one of which is where the note is non-negotiable.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. W. R. Guy, Judge.

The facts are stated in the opinion of the court.

Platt & Bayne, Geo. J. Leovy, and Lloyd M. Robbins, for Appellant.

J. Wade McDonald, for Plaintiff-Respondent.

Puterbaugh & Puterbaugh, for Edwin H. Lamme, Defendant.

TAGGART, J.—This is an action by the assignee of the indorsee of a deposit receipt to recover the value in United States money of two thousand Mexican dollars deposited with the banking-house of the defendant corporation, located in Hongkong, China. Judgment was for plaintiff against the banking corporation, and the latter appeals from the judgment and the order denying its motion for a new trial.

The depositor, the American Commercial Company, was incorporated in the District of Columbia for the purpose of

doing a general brokerage business wherever such business could be lawfully conducted. Its certificate of incorporation, dated August 13, 1904, provides that "the concerns of the company for the first year shall be managed by not less than three nor more than fifteen directors, namely" (naming five persons, as to whom it is important here to say only that one is "E. Edwards"). The main office is fixed in the city of Washington. So far as the record in this case discloses, it has never done any business except in China. On November 26, 1904, Mr. E. Edwards, accompanied by two of the other directors of the American Commercial Company, their names not being disclosed, deposited with the branch bank of the defendant corporation located at Hongkong, China, two thousand Mexican dollars, receiving therefor a receipt as follows:

"Notice of withdrawal given 26 November, 1904, due 26 November, 1905.

"International Banking Corporation.

"Deposit receipt.

"Not transferable.

"Hong Kong, 26 November, 1904.

"2,000 Locally.

"Received from Messrs. The American Commercial Company Dollars Two Thousand Locally as a deposit repayable here, bearing interest at the rate of five per cent per annum, to remain until twelve months notice on either side expires.

"No. 3/134.

"For the International Banking Corporation.

"L. L. FESPNER, CHAS. C. R. SCOTT,
"Accountant. Manager."

On the back of said receipt were the following words in print: "N. B. The within sum cannot be drawn, unless this receipt is returned, signed by the depositors; nor can the amount be drawn against in separate sums by cheque or draft. The interest will cease at the expiration of notice of withdrawal." From the deposition of Manager Scott, who signed the foregoing receipt, it appears that when Mr. Edwards called, accompanied by the other gentlemen as above stated, he, Scott, acting on behalf of the defendant corporation, at first refused to receive the money because "Mr. Edwards could show me no authority for acting as managing director of the American Commercial Company. He, how-

ever, declared that he would be able to produce the necessary papers, which I told him would have to be signed by the British or other foreign consul in the United States before he could withdraw the money, and he made the deposit on that understanding." No objection was made to the introduction of this testimony, but the incompetency of parol evidence to vary a writing may be considered as a matter of law.

Through transactions had with E. Edwards, acting in the name of the American Commercial Company, the latter became indebted to the defendant Lamme who, in an action brought in the United States consular court at Shanghai, China, on July 27, 1905, recovered judgment against the American Company in the sum of two thousand one hundred and fifty Mexican dollars, with interest. On October 2, 1905, he also procured from the same court what is designated as a supplemental decree and order of satisfaction of judgment, wherein it is recited that the deposit receipt above set out "was by the defendant duly assigned, transferred and delivered to the plaintiff by the defendant on or about the tenth day of March, 1905, to secure the debt due from the defendant to plaintiff upon which the judgment in this cause was rendered." It is further recited that plaintiff is willing to take the instrument in satisfaction of the judgment, and ordered that the title of the plaintiff in the receipt and the money evidenced thereby be confirmed and quieted in him and the same credited on said judgment in full payment and satisfaction thereof. The recital in the judgment in this consular action as to service of summons and acquiring jurisdiction of the defendant is as follows: "That the defendant has been duly served with summons by delivering a copy of the same to Edward Edwards, the vice-president, a director and agent of said defendant, he being the highest officer of said defendant company found within this jurisdiction, and the said defendant having appeared by said Edwards and filed its answer herein, admitting all the allegations of plaintiff's complaint." The only showing of jurisdiction to enter the "Supplemental Decree" is that which appears in the original judgment-roll resulting in the judgment in favor of Lamme against the American Company.

The "deposit receipt" indorsed, "The American Commercial Company, by Edward Edwards, (Per) Manager,"

was thereupon presented at its maturity to the defendant bank at Hongkong, on behalf of Lamme, accompanied by a copy of the consular judgment and decree above mentioned, but payment was refused because no showing was made of Mr. Edwards' authority to indorse for the company, and thus give the bank a legal discharge. Afterward, to wit, on December 29, 1905, Lamme brought another action in the consular court of Shanghai against the International Banking Corporation and The American Commercial Company. The former appeared and the latter defaulted (there being a recital in the "Findings and Judgment" that the American Company had "been duly served with summons" and failed to appear). In this action the court found all the facts substantially as above set forth as to the indebtedness of the American Company to Lamme, the making of the judgment of July 27, 1905, and the decree of October 2d; the presentation of the receipt and the defendant bank's refusal to pay; also, that no one else had made any claim upon the money; that there were no liens, claims or demands against it, and that the bank had no setoff or demands against it, but "that the said money having been so deposited with the said International Banking Corporation at Hongkong and the said deposit receipt being non-negotiable, the same is collectible only under adequate authority from the said American Commercial Company." Only inferentially is it found that adequate authority was not shown, but the court's conclusion of law is that plaintiff is not entitled to recover in this action, and the judgment is that the action be dismissed without prejudice to the plaintiff in bringing any other on account of the subject matter of this action. The date of this judgment, as stated in the record, is February 24, 1905, but it is apparent that it should be 1906. No appeal was ever taken therefrom.

Subsequently the receipt of deposit was lost (March, 1907), and later (January 2, 1908), the rights of defendant Lamme in the instrument in question and the funds which it represented were assigned to plaintiff, and, after demand made by plaintiff on the San Francisco house of defendant, this action was brought to recover the value of the Mexican money in United States gold coin at Hongkong on the date of the demand made by Lamme (November 27, 1905), together with

interest thereon at the rate of five per cent per annum from November 26, 1904.

The instrument in question was by this court declared to be an assignable instrument but not negotiable in the sense that the term "negotiable" is used when applied to commercial paper. (*Dollar v. International etc.*, 10 Cal. App. 83, [101 Pac. 34].) By the law of the case, then, the instrument must be considered as non-negotiable, and while it might be transferred by indorsement, the indorsee obtained no better title to the instrument than his indorser, notwithstanding it was indorsed to him before maturity. (Civ. Code, sec. 1459.) It was also held by this court, passing upon the allegations of the complaint, that, although the instrument was payable at Hongkong, yet after proper demand had been made at that place and payment refused suit might be brought in this state "where the parties enter an appearance and question only the sufficiency of the pleading as stating a cause of action."

Whether or not a proper demand was made at the place of payment becomes important in determining the right to bring the action in a court of this state, as well as in ascertaining upon what basis the value of the "money" so deposited is to be fixed, if the plaintiff is entitled to recover. The judgment of the consular court of July 27, 1905, even if it were conceded to be based upon proper service on the American Commercial Company, established no more than that that company was indebted to Mr. Lamme in the sum named in the judgment. The so-called "supplemental decree," whereby the court attempted to transfer the title of the American Company to the receipt to Mr. Lamme, was ineffective for that purpose, and did not affect the contract between that company and the appellant. The only possible application it could have would be in connection with the testimony of Mr. Lamme to the effect that Mr. Scott made a statement under oath that he had a conference with General Bragg, the latter acting on behalf of Mr. Lamme, wherein there was "practically" an arrangement, and Scott consented, that if the judgment in the consular court first above mentioned were obtained and the certificate applied upon it, "that the money would be paid on presentation." Such an estoppel being in the form of a new cause of action should have been pleaded

to become the basis of a recovery. If plaintiff recovers in this action he must do so on the theory of an enforcement of the express contract made by Edwards, or the implied contract of a depositor, no estoppel being pleaded.

Both appellant and respondent rely upon the "findings and judgment" in the second consular action, which were rendered on February 24, 1906. No finding made therein, however, which was not necessary to the judicial action taken by the court, can affect the rights of either of the parties, and the judgment, as above stated, is one of dismissal without prejudice to the plaintiff's right to bring another action. (*Rosenthal v. McMann*, 93 Cal. 505, 509, [29 Pac. 121].) The findings made on behalf of the plaintiff are conclusive upon no one, and there is no express finding of fact from which it can be determined that the judgment of dismissal was rendered because the authority accompanying the presentation of the instrument was not adequate. It is only argumentatively that this can be assumed to be the basis of the court's dismissal. Neither can this be implied or presumed from the judgment itself.

It appears from Mr. Lamme's testimony on the trial that he knew from dealings had by him with Edwards in the name of the American Commercial Company; from papers and documents seen by him while acting as attorney for the company on the employment of Edwards; from his knowledge that Edwards appointed agents and subagents for the corporation in Canton, Shanghai, and other places in China, and created debts against the company and paid them in its name; and from the fact that no other person acted as its agent in these places during this time, and that he never heard the authority of Edwards questioned except in this transaction, as well as from Edwards' own statement, that he (Edwards) was the vice-president, one of the directors of and the general manager for the American Commercial Company in China. It is not shown that any of this information was brought home to the defendant bank, or that the bank had any other way of knowing that Edwards had such authority or occupied such a position, but from Mr. Lamme's testimony it appears that Mr. Scott stated at the trial before the consular court that "the only reason for refusal to pay the money was that there had been no power of attorney pre-

sented at the bank showing the authority of Edwards," etc. "He wanted a resolution of the board of directors."

The defendant bank is concerned only in knowing that the assignment of the evidence of debt or chose in action is of such character as to bind the assignor. (*Greig v. Riordan*, 99 Cal. 323, [33 Pac. 913].) If the American Commercial Company had itself presented the deposit receipt, no compliance with the oral contract as to the evidence of authority of Edwards could have been made a condition precedent to payment, if it be assumed in this connection that such a parol contract was admissible in evidence, or, being in evidence, could be considered by the court. Indeed, it could not well be contended that, in the absence of this contract, Mr. Edwards could not himself, in his capacity of manager, have withdrawn the money upon signing the name of The American Commercial Company, or have made a valid assignment or indorsement of the instrument as manager. As said in *McKiernan v. Lenzen*, 56 Cal. 61, page 64: "The result of the cases seems to be, that where the management of the affairs of a corporation is intrusted to a general managing agent, he has power to assign the choses in action of the corporation to its creditors, either in payment of, or as security for the payment of, a precedent debt of the corporation, without express authority from the board of directors, and an assignment so made is valid. The presumption is, that the assignment was made by one having competent authority." No special resolution authorizing him to act in this respect was necessary. (*Tuller v. Arnold*, 98 Cal. 523, [33 Pac. 445]; *Greig v. Riordan*, 99 Cal. 323, [33 Pac. 913].)

An ostensible agency is created when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. The authority of such an agent is such as the principal allows such persons to believe the agent to possess. (Civ. Code, secs. 2300, 2317.) There is no attack here made upon the good faith of Mr. Lamme in performing services for the American Commercial Company at the request of Mr. Edwards, or in taking the receipt in full payment for his services so rendered, and this must be assumed in considering the question before us. Mr. Lamme then stood in the shoes of the American Commercial Company as owner of the paper, subject only to such equities as the bank might set up against

that company. If the oral contemporaneous agreement as to what should constitute a showing of Mr. Edwards' authority would not constitute a defense against the demand of the company, neither would it against the demand of Mr. Lamme. The latter being the *bona fide* assignee of the Commercial Company, his acquittance to the bank would be sufficient defense to any subsequent demand made upon the bank by such company. Contemporaneous parol agreements made between the parties to a written obligation to pay money, as to the manner of its negotiation, cannot be set up as a defense against payment of the money under the contract in an action by the payee or his assignee. Such agreements come within the rule that written contracts cannot be varied by parol agreements, and the rule is applicable to such agreements irrespective of whether the instrument be negotiable or non-negotiable in character. (*Johnson v. Washburn*, 98 Ala. 258, [13 South. 48]; *Erwin v. Saunders*, 1 Cow. (N. Y.) 249, [13 Am. Dec. 520]; *Frost v. Everett*, 5 Cow. (N. Y.) 497; *Dow v. Tuttle*, 4 Mass. 414, [3 Am. Dec. 226]; *Knox v. Clifford*, 38 Wis. 655, [20 Am. Rep. 28]; *Reed v. Reed*, 11 U. C. Q. B. 28; *Gorrell v. Home Life Ins. Co.*, 63 Fed. 371, 11 C. C. A. 240, 246.)

It also appears from the written opinion of the trial judge found in the record that the findings as to the rights of plaintiff were predicated to some extent at least upon the showing that if there had been any real question as to the authority of Edwards to act in the premises, his principal would have made known its objections to the defendant bank within the time that elapsed from the date of the deposit of the money until the bringing of the action. So, also, in this connection may be considered the materiality of the evidence of Lamme tending to establish, not only that Edwards was the manager, but that there was no other representative of the company in China, and that no one questioned his authority to act in this sole and unrestricted manner. There was no showing upon the part of the defendant bank with respect to the absence of authority of Edwards or any denial of his powers generally, and the evidence mentioned tended to show that all the business of the company in China was performed by him or those whom he appointed and directed, and was competent for that purpose.

No indemnity bond was essential in giving judgment, on account of the loss of the instrument sued on. The rule as to indemnity is simply that if it can be shown in any way that the defendant may be wrongfully injured by paying, he may require security, but only then. The rule in courts of equity that a bond will be required before entering judgment upon a lost instrument has several well-recognized exceptions, to wit: (1) Where the note is not negotiable; (2) where, though negotiable, it is payable to the order and unindorsed, or specially indorsed; (3) where the instrument is clearly shown to have been destroyed; (4) where the lost instrument has been traced to the defendant's custody; and (5) when it is shown that the defendant is protected by the statute of limitations. (Daniel on Negotiable Instruments, 5th ed., sec. 1481.) The evidence would justify a finding that the instrument in this case has been lost, but no finding in this regard was made; however, it is clear that the instrument itself is non-negotiable in character.

The testimony of the witness Lamme as to his knowledge of the capacity in which Edwards was acting for the American Commercial Company contained some things which were in the nature of conclusions or inferences, but these were accompanied by a statement of the facts from which the inferences were drawn, and we do not think the evidence objected to could have prejudiced appellant's case before the trial court.

The demand for payment having been regularly made by Lamme at Hongkong on November 27, 1905, the damages for failure to pay are to be computed under the rule declared in subdivision 1 of section 3336 of the Civil Code. This would entitle plaintiff to the market value at Hongkong when payment was refused, together with interest as allowed in the judgment. Indeed, it would not have been unwarranted had the court allowed interest at seven per cent after the date of maturity of the receipt, but no complaint is made by respondent in this respect.

Judgment and order affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 28, 1910, and the following opinion was then rendered thereon:

THE COURT.—Appellant presents a petition for a rehearing on this appeal wherein, among other things, exception is taken to the following language contained in the opinion of this court, filed April 28, 1910, to wit: "No objection was made to the introduction of this testimony, but the incompetency of parol evidence to vary a writing may be considered as a matter of law." In support of the contention that this is not a correct declaration of the law a number of cases are cited to sustain the proposition that, in the absence of objection, secondary evidence is sufficient to support the findings of a court based thereon. The rule declared by this court is entirely distinct from that applied in those cases. Whether or not a contract in writing may be varied by parol evidence is a question of substantive law, while the admission or rejection of secondary evidence is governed by the rules of evidence. (1 Greenleaf on Evidence, 16th ed., sec. 305a.) Where a contract is reduced to writing, whether required by law to be written or not, the writing supersedes all other negotiations and stipulations concerning the matter made at the time or prior thereto. (Civ. Code, sec. 1625.) If the terms as agreed upon have not all been reduced to writing, these can be supplied only by an appropriate proceeding, or under proper allegations. (Code Civ. Proc., sec. 1856; *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 595, [96 Pac. 319].) By way of illustration of the distinction between the rule declared by this court and that cited by appellant, it may be said, that parol or secondary evidence, unobjected to, might supply the terms, or purport, of a contract which had been reduced to writing, and, in this form, furnish sufficient proof to sustain a finding, but parol evidence would neither be admissible to vary this contract, nor, if admitted without objection, be sufficient to support a finding which was in conflict with or which in any manner varied the original written contract which the parties entered into. The purpose of the rule relating to the varying of a writing by parol evidence is to prohibit this from being done, while the rule relating to the admission of secondary evidence goes only to the form in which the evidence may be introduced. These rules are in no way inconsistent, and the rule as to secondary evidence

is not applicable here. The other matters presented were duly considered in the original opinion.

The petition for a rehearing is denied.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on June 27, 1910. Beatty, C. J., dissented from the order denying such rehearing.

[Civ. No. 620. Third Appellate District.—April 29, 1910.]

H. B. MERRYMAN and ROSE F. MERRYMAN, His Wife,
Respondents, v. GEORGE KIRBY et al., Appellants.

EJECTMENT—PLEADING—SUFFICIENCY OF COMPLAINT.—A complaint in ejectment which alleges ownership and possession by plaintiffs at the time of the entry of the defendants, and ownership at the time of the commencement of the action, and that defendants, on or about a day specified, unlawfully entered the premises, and still withhold the possession thereof from plaintiffs, contains all of the averments required in an action of this character.

ID.—ISSUE RAISED BY ANSWER—TRIAL—WAIVER OF OBJECTION UPON APPEAL.—Where the defendants in their answer denied that plaintiffs *now are*, or during all of the times hereinafter mentioned, or at any other time, or at all, were, or either or any of them, were, the owners of the land and premises, they tendered an issue as to the seisin of plaintiff up to the time the action was brought; and when that issue was tried and determined against the defendants, it is too late for them to raise the objection upon appeal that no such issue was tendered by the complaint.

ID.—SUFFICIENCY OF DESCRIPTION OF LAND—IDENTITY—PRESUMPTION. It is sufficient that the description of the land can be so identified that in the event of a recovery the officer executing the writ will know what land plaintiff is entitled to, and thus be enabled to effect the purpose of the action. Where the description is not manifestly insufficient to identify the property, so that it can be located on the ground, it must be presumed, in the absence of evidence to the contrary, that the corners referred to in the description are marked so as to be easily identified.

ID.—MODES OF DESCRIPTION.—The premises may be sufficiently described by a particular name, by which they are known, by their boundaries, by number, by lot and concession, or by section and township, or as part of a section of a certain survey.

ID.—EVIDENCE NOT BROUGHT UP—INTENDMENTS IN FAVOR OF JUDGMENT.—Whatever may appear from the pleadings, where the evidence is not brought up, all intendments are in favor of the judgment; and it must be assumed that the land awarded can be located with precision.

ID.—DESCRIPTION DEEMED SUFFICIENT.—The description of the land in the complaint as "That portion of said lot No. 4 of said section 31, in township 8 N., R. 1 E., H. B. & M., commencing at the southwest corner of the southeast quarter of said section 31, and running thence north two chains to a stake, thence west to where such line would intersect the westerly line of said lot four, thence southerly along the westerly line of said lot four, to the southwest corner of said lot four; thence east to the place of beginning," must be assumed, in the absence of evidence to the contrary, to locate the corners referred to so that they can be easily identified.

APPEAL from a judgment of the Superior Court of Humboldt County. E. W. Wilson, Judge.

The facts are stated in the opinion of the court.

Henry L. Ford, Adam Thompson, and Robt. T. Devlin, for Appellants.

E. M. Frost, and A. J. Monroe, for Respondents.

BURNETT, J.—The action is in ejectment and the appeal is upon the judgment-roll alone from the judgment in favor of plaintiffs.

No demurrer to the complaint was interposed but the appellants now contend that the complaint states no cause of action. In this connection it is asserted that there is no allegation as to ownership of the property at the time of the commencement of the action. Citation is made of authorities to the effect that "plaintiffs must show that at the time of the commencement of the action they have the proper title or interest to support the action of ejectment" (*Moore v. Tice*, 22 Cal. 513), and "he must also have the right to the possession of the land disputed." (*Hawthurst v. Lander*, 28 Cal. 331.)

But there are at least two sufficient answers to the contention of appellants. The first one is that the complaint does allege that plaintiffs are the owners of said property, and, secondly, if this were not so, the averments of the answer

would cure the defect. The allegation is, "That the plaintiffs now *are* and during all the times herein mentioned were either the owners of or their immediate grantors were the owners of the land and premises hereinafter described," etc. The term "owners" is clearly implied after the word "are," and it is safe to say that no one could misunderstand such to be the meaning of the pleader. Again, it is alleged "That said plaintiffs or their said grantors were the owners in fee of those certain lots . . . and are such owners now and during all of the times hereinafter mentioned and in the possession thereof. That while so possessed defendants on or about the—day of May, 1907, without right or title so to do, entered that portion of said lot number 4 of said section described as follows, to wit." We have, therefore, the allegation of ownership and possession by plaintiffs at the time of the entry of defendants, the allegation of ownership at the time of the commencement of the action, and that defendants unlawfully entered the premises and still withhold the possession thereof from plaintiffs. These are all the averments required in an action of this character. (*Payne v. Treadwell*, 16 Cal. 243; *Keller v. Ruiz de Ocana*, 48 Cal. 638; *Johnson v. Vance*, 86 Cal. 128, [24 Pac. 863].)

Again, the defendants in their answer "deny that the plaintiffs *now are* or during all the times hereinafter mentioned or at any other time or at all were, or either or any of them were the owners of . . . the lands and premises," etc.

In *Vance v. Anderson*, 113 Cal. 536, [45 Pac. 817], it is said: "We shall, however, assume that it was the duty of the plaintiff to tender to the defendants an issue as to her seisin or ownership at the date of the bringing of the suit. But the defendants did not wait, as they might well have done, for such tender, for in their answer they not only denied the seisin and right to possession of the plaintiff on the 1st of May, 1894, but added 'or at any other time, or at all, or is now seised in fee,' etc., as above quoted. When defendants thus tendered an issue as to the seisin of plaintiff up to the time the action was brought, and that issue was tried and determined against the defendants, it was too late to raise the objection here."

Appellants are equally at fault in the claim that the land is insufficiently described. "In ejectment the land should be so defined that in the event of a recovery, the officer executing the writ of possession will know to what land plaintiff is entitled, and thus be enabled to effect the purpose of the action." (*Bay State M. & T. Co. v. Jackson*, 27 Colo. 139, [60 Pac. 573].) But it must be manifest that the description here does not appear on its face to be insufficient to identify the property so that it can be located upon the ground. The description is, "That portion of said lot number four of said section (section 31 in township 8 N., R. 1 E., H. B. & M.) described as follows, to wit: Commencing at the southwest corner of the southeast quarter of said section 31, and running thence north two chains to a stake, thence west to where said line would intersect the westerly line of said lot four, thence southerly along the westerly line of said lot four to the southwest corner of said lot four, thence east to the place of beginning."

We must assume, in the absence of evidence to the contrary, that the corners referred to in the description are marked so as to be easily identified. To hold with appellants would be in the face of the presumption that the government survey was properly made and the corners regularly established. It has been held that the premises may be sufficiently described by a particular name by which they are known, by their boundaries, by number, by lot and concession or by section and township. Or it may be sufficient to describe the land as a part of a section of a certain survey. (15 Cyc., pp. 93, 94; *Pellier v. Gillespie*, 67 Cal. 583, [8 Pac. 185].) But even if the pleadings left the matter in doubt, the judgment would have to be affirmed, since the evidence has not been brought up. In *Thompson v. Connolly*, 42 Cal. 315, it was contended that the verdict in describing and locating the division line between the two parcels of land was too vague and uncertain to support the judgment, but the court said: "In support of this proposition it is said that the line of the Hill tract is a mere imaginary line, and that the map furnishes no data for its correct location, nor for ascertaining the quantity of land awarded to the parties severally, or the precise location of either parcel. But we cannot assume that the line of the Hill tract is a purely ideal line, having no visible existence on

the ground. For aught that appears, it may be defined by visible monuments, and its exact location may be a matter of notoriety in the vicinity. All the intendments are in support of the judgment, and there is nothing in the record to raise a reasonable doubt that the land awarded to the plaintiff and defendant can be located with entire precision."

The cases cited by appellants are not opposed to respondents' contention herein, and need not be specifically noticed.

We can see no merit in the appeal and the judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 215. First Appellate District.—April 29, 1910.]

THE PEOPLE, Respondent, v. GEORGE WEBSTER,
Appellant.

CRIMINAL LAW—MURDER—VERDICT FOR MANSLAUGHTER—SELF-DEFENSE—SUPPORT OF VERDICT.—Upon a prosecution for murder, where the verdict was for manslaughter, and the evidence shows that after the defendant and the deceased had quarreled in a saloon, the defendant went and armed himself, and on his return to the saloon fired three shots into the body of the deceased while he was unarmed, from which he died, the evidence was sufficient to sustain the verdict of the jury that the killing was unlawful and not in necessary self-defense.

Id.—SELF-DEFENSE—QUESTION FOR JURY.—Whether the killing was done in self-defense was a question peculiarly for the jury; and it is not the province of this court to interfere with their verdict on that question, which is final and conclusive.

Id.—INSTRUCTION—JURY NOT "FULLY SATISFIED" OF GUILT—"REASONABLE DOUBT."—An instruction that, "Laws are made and juries called to investigate cases as much for the protection of the innocent as for the punishment of the guilty. If, therefore, after a careful consideration of all the evidence, you are not fully satisfied that the defendant is guilty, you must say so by your verdict. By so doing the object of the law will be as fully attained as if you rendered a verdict of guilty," is not prejudicial to appellant, because of the use of the words "fully satisfied," instead of the words "satisfied to a moral certainty and beyond a reasonable doubt." Passing the point that the instruction is favorable to the defendant,

where it appears that the law of "reasonable doubt" was often and clearly stated, the jury could not have misunderstood his rights in that regard.

ID.—INSTRUCTION AS TO "CONSEQUENCES OF VOLUNTARY ACT"—PRESUMED INTENTION.—The court correctly instructed the jury that "a person must be presumed, and is presumed, to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts; and therefore, if one person assaults another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the person assailed, the natural presumption is that such assailant intended death or other great bodily harm. In the absence of evidence to the contrary, this presumption must prevail."

ID.—JUSTIFIABLE HOMICIDE—INACCURATE INSTRUCTION NOT PREJUDICIAL —FULL INSTRUCTIONS AS TO "APPARENT NECESSITY."—An instruction that "to justify homicide on the ground of self-defense, it must appear that the danger was so urgent and pressing that, in order to save the life of the slayer or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and it must appear the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further struggle," though it is inaccurate, and should not have been given, yet the giving of it is not prejudicial, where the right of the defendant to act upon "apparent necessity" was fully and completely recognized in numerous other instructions.

ID.—INSTRUCTIONS AS TO SELF-DEFENSE TOO BROADLY STATED.—*Held*, that requested instructions as to the right of self-defense against an "unlawful attack," and assuming that a person can deliberately persist in the mere exercise of a technical right, when he has reason to know that by so doing he will be placed under the necessity of killing a person in self-defense, were too broadly stated, and were properly refused.

ID.—SIMPLE ASSAULT NOT JUSTIFYING HOMICIDE.—A simple assault would be an "unlawful attack," yet it would not justify a homicide.

ID.—"UNLAWFUL ATTACK" WARRANTING SELF-DEFENSE.—The only "unlawful attack" which would warrant the defendant in killing his assailant is such an attack as would put him, as a reasonable person, in fear of being killed or of receiving great bodily harm; any "unlawful attack" falling short of this would be unavailable as a defense to a charge of homicide.

ID.—PERSISTENCE IN MERE TECHNICAL RIGHT—SELF-DEFENSE NOT PERMISSIBLE.—A person cannot deliberately persist in the immediate exercise of a mere technical right when he has reason to know that by so doing he will be placed under the necessity of killing a human being in self-defense.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order denying a new trial George E. Church, Judge.

The facts are stated in the opinion of the court.

L. J. Schino, B. F. Fowler, and Henry Brickley, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

KERRIGAN, J.—Defendant was informed against by the district attorney of the county of Fresno for the crime of murder. He was tried and found guilty of manslaughter. He moved for a new trial, which motion was denied, and he was thereupon sentenced to imprisonment in the state prison for the period of ten years. This is an appeal from the judgment, and from an order denying defendant's motion for a new trial.

The defendant and the deceased on July 18, 1909, quarreled in a saloon in Coalinga, Fresno county. Separately they left the saloon, and within half an hour met again in the same place. They engaged in a second quarrel, as the result of which the defendant (who in the interval between the two quarrels had armed himself with a pistol) shot and killed the deceased.

The defendant claims that the evidence is insufficient to support the verdict of the jury.

The evidence shows that the defendant fired three shots at and into the body of deceased, and that deceased was unarmed at the time. While the defendant and deceased had been engaged in a quarrel a short time before, the facts that defendant went away, armed himself, and of his own volition returned to the saloon where the deceased was, and then and there shot and killed deceased, were sufficient to justify the jury in the inference that the killing was unlawful, and not in necessary self-defense as claimed by defendant. Whether the killing of deceased was done in self-defense was a question peculiarly for the jury, and it is not our province to interfere with their verdict. Under such circumstances the verdict of the jury is final and conclusive. (*People v. Emer-*

son, 130 Cal. 562, [62 Pac. 1069]; *People v. Stokes*, 11 Cal. App. 759, [106 Pac. 251].)

The court instructed the jury that "Laws are made and juries called to investigate cases just as much for the protection of the innocent as for the punishment of the guilty. If, therefore, after a careful consideration of all the evidence, you are not fully satisfied that the defendant is guilty, you must say so by your verdict. By so doing the object of the law will be as fully attained as if you were to find a verdict of guilty."

Defendant complains of this instruction because the words "fully satisfied" were used, and not the more usual expression "satisfied to a moral certainty and beyond a reasonable doubt." It would be difficult to conceive of a case in which a jury could be "fully satisfied," and at the same time not be satisfied "to a moral certainty and beyond a reasonable doubt." Passing the point that on the whole this instruction is favorable to the defendant, we think the part complained of could not have injured him, for the defendant's right to be presumed innocent and to have his guilt established beyond a reasonable doubt was so often and clearly stated to the jury, that they must have understood his right in that behalf. In the case of *People v. Flynn*, 73 Cal. 511, 514, [15 Pac. 102, 103], the trial court had employed the word "satisfied" instead of the words "satisfied beyond a reasonable doubt," and it was claimed that the instruction was erroneous. The court said: "Looking at the whole charge, it will be found that the words 'beyond a reasonable doubt' are repeated *fifteen times*. . . . Taking then, the whole charge, and reading, as we must, the different parts of it together, it appears that the jury were clearly told that they could not find the defendant guilty of burglary of the first degree, *or at all*, unless they were satisfied of his guilt beyond a reasonable doubt. We are unable, therefore, to see how the defendant could have been prejudiced by the part of the charge objected to."

The court also instructed the jury as follows: "A person must be presumed, and is presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts, and therefore, if one person

assails another violently with a dangerous weapon likely to kill, and which does in fact destroy the life of the person assailed, the natural presumption is that such assailant intended death, or other great bodily harm. In the absence of evidence to the contrary, this presumption must prevail."

Section 1963 of the Code of Civil Procedure enumerates certain disputable presumptions, and in part provides:

"Subd. 2: That an unlawful act was done with an unlawful intent;

"Subd. 3: That a person intends the ordinary consequences of his voluntary act."

Defendant claims that this instruction was at variance with the statute, and in using the word "must" that it in effect deprived the defendant of the benefit of the presumption of innocence. We perceive no sound basis for an objection to this instruction. While the instruction states that a person must be presumed to intend the ordinary consequences of his voluntary act, it also, in compliance with section 1961, Code of Civil Procedure, states that said presumption applies in the absence of evidence to the contrary. That is to say, the defendant must be presumed to intend the natural and usual consequences of his act, unless there is evidence, direct or indirect, to controvert this presumption.

The most serious question in the case arises as to the instruction given by the court at the request of the people upon the subject of what constitutes justifiable homicide. The instruction is as follows: "To justify homicide on the ground of self-defense, it must appear that the danger was so urgent and pressing that, in order to save the life of the slayer, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and it must appear that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further struggle before the fatal shooting."

Subdivision 3 of section 197 of the Penal Code provides that homicide is justifiable when committed by a person "in the lawful defense of such person when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished." Defendant contends that the court, by the use of the words "absolutely necessary," incor-

porated into the instruction an element not warranted by the statute; that the jury were told that a defendant in a criminal case is justified in killing his assailant when the facts and circumstances make it absolutely necessary, or, in other words, that he had no right to act upon apparent necessity. To support his position he cites *People v. Flahave*, 58 Cal. 249, which, it must be conceded, is squarely in point, and upholds defendant's position. But the case has not been followed. (*People v. Bruggy*, 93 Cal. 476, [29 Pac. 26]; *People v. Westlake*, 62 Cal. 303.) In *People v. Cord*, 157 Cal. 562, [108 Pac. 511], the instruction is upheld. But we are able in this case, as was the supreme court in the case of *People v. Morine*, 61 Cal. 369, where the same instruction was considered, to say that other instructions given qualify and explain the objectionable instruction, and that the charge read as a whole correctly presents the law on the subject. In that case there were three instructions which explained the one questioned. Here there are at least seven, and they were so full and clear that the jury must have understood that the defendant had a right to act upon appearances. In conclusion, we feel constrained to say that the instruction is not an accurate statement of the law and should not have been given.

The court refused to give the following instruction: "In this case the defendant had a right to go back to the saloon for the purpose of procuring a drink or for any lawful purpose, even if he expected to be attacked by the deceased on the way, or after he had entered the place, and if he was for that purpose in this saloon, he had a right to be there, and his going did not of itself take away from him the right of self-defense if unlawfully attacked."

The right of self-defense is too broadly stated in this instruction. The unlawful attack which would warrant a defendant in killing his assailant is such an attack as would put him, as a reasonable person, in fear of being killed or of receiving great bodily harm; and any unlawful attack falling short of this would be unavailable as a defense in a charge of homicide. A simple assault would be an unlawful attack, yet it would not justify homicide.

There was one other instruction similar to the one just discussed proffered by the defendant and refused by the court, but it also stated the rights of the defendant too broadly.

We do not believe, as was assumed in the instruction, that a person can deliberately persist in the immediate exercise of a mere technical right when he has reason to know that by so doing he will be placed under the necessity of killing a human being in self-defense.

We have examined the other instructions complained of, but find them without error.

The judgment and order are affirmed.

Hall, J., and Cooper, P. J., concurred.

[Crim. No. 122. Third Appellate District.—April 29, 1910.]

THE PEOPLE, Respondent, v. EDWARD HOLDEN, Appellant.

CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT ROBBERY—SUFFICIENCY OF INFORMATION.—An information against defendants jointly charged with the crime of "assault with intent to commit robbery," in that said defendants, at a time specified, at the county of the venue, "in and upon one John Connolly, feloniously, and with force and violence, did make an assault, with intent the money, goods and chattels of the said John Connolly, from the person and immediate presence and against the will of him, the said John Connolly, then and there, feloniously, and by force, violence and intimidation, to steal, take and carry away, contrary to the form of the statute," etc., is sufficient, and a demurrer thereto was properly overruled.

1D.—RULE AS TO "MEANS" INAPPLICABLE—UNNECESSARY AVERMENTS.—The rule that where "an assault by means likely to produce great bodily injury" is charged, there must be a particular designation of the "means used," does not apply to the offense here charged. It is not necessary that the information for "an assault with intent to commit robbery" should allege how or by what "means" the assault was committed, or should set forth the "means" used to constitute force or to excite fear.

1D.—AVERMENT OF "POSSESSION OF PROPERTY" NOT REQUIRED—GIST OF OFFENSE—SUFFICIENT AVERMENT OF INTENT TO ROB.—The information was not required to aver that the prosecuting witness was, at the time of the offense, in the possession of personal property. Highwaymen do not first ascertain whether their victim has money or property before attacking; and it would be unreasonable to hold

that an intent to rob could not be charged, without averring or proving that the victim had something of which he could be robbed. The gist of the offense is the assault with intent to rob; and the information properly sets forth the assault with the intent by force, violence and intimidation to rob the prosecuting witness of his "money, goods and chattels."

ID.—INSTRUCTIONS—REQUESTS ELSEWHERE GIVEN.—The defendant was not prejudiced by the refusal of requested instructions which were elsewhere substantially given in the charge of the court.

ID.—INSTRUCTION AS TO GOVERNMENT BY EVIDENCE—REQUEST AGAINST "PREJUDICE" AND "SUSPICIONS"—ASSUMED INTELLIGENCE OF JURY. It must be assumed that the jury were intelligent men; and if they are instructed by the court that they must be governed by the evidence alone, it cannot be said that they were governed otherwise, because not instructed at defendant's request not to be governed by any "prejudice" or by their "own unaided suspicions."

ID.—REFUSAL OF REQUEST AS TO CIRCUMSTANTIAL EVIDENCE NOT PREJUDICIAL.—It cannot be said that the refusal to give a detailed instruction as to circumstantial evidence was prejudicial, where substantially all of the evidence of the crime was direct; and the law makes all competent evidence admissible, whether direct or circumstantial, and leaves it to the jury to determine its relative weight in each case. When, therefore, full instructions were given that the jury must be guided entirely by the evidence, and must be convinced beyond a reasonable doubt, they cover both classes of evidence, and it must be assumed that the jury will so apply them.

ID.—REQUESTED INSTRUCTION—CAUTION AS TO VERBAL ADMISSIONS.—A requested instruction declaring that "with respect to all verbal admissions it may be observed that they should be received with great caution," was properly refused as being argumentative and an instruction concerning matters of fact.

ID.—ARGUMENT UPON APPEAL—ALLEGED ERRORS DEEMED WAIVED.—Alleged errors in the admission of evidence not pointed out in the appellant's brief must, in the absence of any oral argument presenting them, be deemed waived.

APPEAL from a judgment of the Superior Court of Placer County, and from an order denying a new trial. N. D. Arnot, Judge.

The facts are stated in the opinion of the court.

L. L. Chamberlain, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

CHIPMAN, P. J.—Defendant and one Edward Hansen were jointly charged with the crime of an assault with intent to commit robbery upon one John Connolly on September 28, 1909. A demurrer to the information was overruled and defendant Holden was tried separately and found guilty as charged. A motion for a new trial was denied and defendant was sentenced to imprisonment in San Quentin for three years. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The information charges the crime of felony as follows: "Assault with intent to commit robbery, committed as follows: the said Edward Holden and Edward Hansen on or about the 28th day of September, A. D. 1909, at the said County of Placer, in the said State of California, and before the filing of this information, in and upon one John Connolly, feloniously and with force and violence did make an assault with intent the money, goods and chattels of the said John Connolly, from the person and immediate presence and against the will of him, the said John Connolly, then and there feloniously and by force, violence and intimidation to steal, take and carry away, contrary to the form," etc.

1. It is urged that the demurrer should have been sustained: First, because the information does not state that the prosecuting witness had any "money, goods and chattels" upon his person or in his immediate presence at the time of the alleged assault; second, that the circumstances of the assault are not set forth nor what kind of force or violence or intimidation was used. Section 220, Penal Code, provides: "Every person who assaults another with intent to commit . . . robbery . . . is punishable," etc. Section 950 requires "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended"; and section 952, subdivision 3, provides that "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense," must be stated. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, sec. 211.) "An assault is an unlawful attempt,

coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, sec. 240.)

The argument is that the crime charged is a composite crime (Pen. Code, sec. 220)—an assault coupled with the intent to rob being the complete offense, and hence the particular circumstances of the offense charged must be set forth in the information and that it is not sufficient to charge the offense in the language of the statute. (Citing *People v. Perales*, 141 Cal. 581, [75 Pac. 170]; *People v. Mahoney*, 145 Cal. 104, [78 Pac. 354]; *People v. Shearer*, 143 Cal. 66, [76 Pac. 813].) *People v. Perales* is claimed "to be almost a parallel case." The charge there was "assault by means likely to produce great bodily injury," the means described being "with a heavy wooden stick." The court held that there was "no proper or particular designation of the means which it is claimed were used in its commission." The court laid down this rule: "Where the words or terms used in the statute have no technical or precise meaning, which of themselves imply the offense, or where the particular facts or acts which shall constitute it are not specified, but, from the general language used, many things may be done which may constitute an offense, it is then necessary, in charging an offense claimed to be embraced within the general language of the statute, to set forth the particular things or acts charged to have been done, with reasonable certainty and distinctness, so that the court may determine whether an offense within the statute is charged, or one over which it has jurisdiction, and so that the defendant may be advised of the particular nature of it, in order to defend against it, and to plead in bar a judgment of conviction or acquittal thereof, if subsequently prosecuted." It is urged now that it is impossible "to tell whether defendant is charged with having made an assault with a weapon; whether he knocked the prosecuting witness down with his fist; whether he intimidated him by threats of prosecution for some crime by holding a loaded revolver at his heart, or an ax over his head. There is absolutely nothing to show what means or force was used to intimidate him." In *People v. Weir*, 10 Cal. App. 460, [102 Pac. 539], the information charged that the assault was made with "deadly weapon," to wit, a "revolver," and was held sufficient in following the language of the statute.

In the case here the crime charged is "assault with intent to commit robbery," and is unlike the Perales case, *supra*. It was not necessary to allege how or by what means the assault was made. Nor was it necessary to set forth the means used to constitute force or to excite fear. Neither was it necessary to aver that the prosecuting witness was at the time in possession of personal property. Highwaymen do not first ascertain whether their victim has money or other property before attacking, and it would be unreasonable to hold that an intent to rob could not be shown without averring and showing that the victim had something of which he could be robbed. The crime consists of the assault with intent to rob. The information charged that the assault was made with force and violence and also charged that the intent was to feloniously and by force, violence and intimidation, steal, take and carry away the money, goods and chattels of the prosecuting witness and against his will. The information was sufficient.

2. Defendant asked an instruction (marked 6) to the effect that the jury must be guided according to the law as given by the court. It was refused, and without prejudice, for it was substantially given elsewhere.

3. Instruction marked 11 was refused, and, it is claimed, to defendant's prejudice. This instruction is but an elaboration of the instruction elsewhere given that the jury must look alone to the evidence. By this is implied that they were not at liberty to act upon their "own unaided suspicions" or on account of "any prejudice they may have conceived prior to or during the trial." We must assume that the jury were intelligent men, and when told that they must be governed by the evidence and that only, we cannot say that they acted otherwise because not particularly cautioned not to be influenced by prejudice or by their suspicions.

4. The modification of instruction 12 by omitting a portion of it did not detract from its force or fail to distinctly state that the defendant was entitled to the individual judgment of each juror.

5. The jury were correctly and fully instructed upon what constitutes a reasonable doubt. It was not error to refuse to give it again as was asked by instruction 19.

6. Instruction 20, asked by defendant and refused by the court, correctly stated the law as to circumstantial evidence, but we do not think that the defendant was prejudiced because not given. They were many times and in various forms told that they must be guided wholly by the evidence and such instructions embraced all the evidence, direct and circumstantial. Where the case rests entirely or chiefly upon circumstantial evidence, it is desirable that some direction be given the jury as to the necessity for establishing each fact, beyond a reasonable doubt, which is essential to complete the chain of circumstances tending to establish the crime charged. But we are not prepared to say that a refusal to give such an instruction would necessarily be prejudicial error, for the law makes all competent evidence admissible, whether direct or circumstantial, and leaves the jury to determine its relative weight in each case. When, therefore, full instructions were given that the jury must be guided entirely by the evidence, and must be convinced by it beyond a reasonable doubt, the instruction goes to both classes of evidence, and it must be assumed that the jury will so apply it. Furthermore, in the present case, substantially all of the evidence of defendant's guilt was direct, and there was no call for an instruction upon circumstantial evidence. Instructions 21, 22, 23, 24 and 25 were along the same line, and need not be further noticed.

7. Instruction 26, asked by defendant, was properly refused. It is argumentative and is an instruction concerning matters of fact. The instruction opens with the declaration that "with respect to all verbal admissions it may be observed that they should be received with great caution." In *Goss v. Steiger Terra Cotta etc. Wks.*, 148 Cal. 155, [82 Pac. 681], a similar instruction was refused, and the court held that it was not prejudicial error. The cases on the point are there reviewed. Instructions 27 and 29 were in substance given elsewhere. In instructions 45, 49 and 50 we discover no error.

It is suggested in the brief of the defendant that the court erred in admitting certain testimony, and states that "these errors are specifically pointed out in the motion for new trial and will be dwelt upon more fully in the opening argument." There was no oral argument, and the alleged errors

are not shown to us in any brief. We must assume that they have been waived.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 807. First Appellate District.—May 5, 1910.]

**WINSOR POTTERY WORKS, a Corporation, Petitioner, v.
SUPERIOR COURT OF STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA et al.,
Respondents.**

APPEAL—ORDER APPOINTING RECEIVER—STAY OF EXECUTION—DUTY OF TRIAL JUDGE—MANDAMUS.—Upon appeal from an order appointing a receiver, it is the duty of the judge of the superior court to fix the amount to be specified in an undertaking to stay the execution of the order pending the appeal; and in case of his refusal to do so, the writ of mandate will lie to compel such action.

ID.—PETITIONER AGGRIEVED BY ORDER APPEALED FROM.—Where the petitioner was made a party defendant to the receivership of corporation property, and it was sought to take possession of lands owned by him and recover possession of the same, he was aggrieved by the order and entitled to appeal therefrom, and had the right to give an undertaking to stay its execution.

APPLICATION for writ of mandate to the Superior Court of Alameda County. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

Costello & Costello, for Petitioner.

Lloyd S. Ackerman, for Respondents.

COOPER, P. J.—This is an application for a writ of mandate to compel the Hon. Frank B. Ogden, one of the judges of the superior court of Alameda county, to fix the amount of an undertaking for the purpose of staying proceedings on appeal from an order made by the said court and

the judge thereof, appointing a receiver in a certain proceeding pending in said court.

There is no dispute as to the facts, and in brief they are as follows: In December, 1909, one Brinkmeyer, claiming to be the owner of certain capital stock of Winsor's California Pottery and Terra Cotta Works, a dissolved corporation, commenced an action in the said superior court against the Winsor Pottery Works, a corporation (the petitioner herein), and a number of other defendants. The object of the said action was, among other things, to have certain deeds of conveyance made by the trustees of Winsor's California Pottery and Terra Cotta Works, a dissolved corporation, to the said Winsor Pottery Works, conveying certain real estate, set aside and canceled, and to have a receiver appointed to take charge of all the property of said dissolved corporation, with power in said receiver to commence actions to set aside the said conveyances and to recover the said real estate from the possession of the said Winsor Pottery Works, and to have its deeds to said property delivered up and canceled.

After the commencement of the said action, without notice to petitioner, but by the consent of the other defendants in said action and at the request of the plaintiff therein, the court made an order appointing one Samuels receiver in said action, which order, among other things, directed and authorized the said receiver "to institute such actions as may be proper to recover for the benefit of the stockholders or members of said dissolved corporation all property and effects which are due and owing to the Winsor's California Pottery and Terra Cotta Works, a dissolved corporation, or to the stockholders or members thereof, by said Winsor's Pottery Works, or any other persons, or at all, under and by virtue of two conveyances or indentures of date August 7, 1908, from Winsor's California Pottery and Terra Cotta Works to Winsor Pottery Works, a corporation, and the other of date August 30, 1909, from Serrill Winsor, S. W. Winsor, Mary B. Winsor and Lydia C. Winsor to Winsor Pottery Works, a corporation, or under and by virtue of any other transaction."

On the twenty-first day of February, 1910, petitioner duly perfected an appeal from the order so appointing said receiver. After said appeal had been so perfected the peti-

tioner applied to the Hon. Frank B. Ogden, the said judge of the superior court, for permission to file an undertaking to stay proceedings upon said appeal, and asked the said judge to fix the amount of said undertaking to stay proceedings upon and pending appeal from said order so appointing a receiver in said cause; but the said judge refused to fix the amount of the said bond or to permit of said bond or undertaking being filed upon said appeal.

The code provides that an appeal may be taken from an order appointing a receiver (Code Civ. Proc., sec. 939, subd. 3). It is further provided (Code Civ. Proc., sec. 943): "If the judgment or order appealed from appoint a receiver the execution of the judgment or order cannot be stayed by appeal unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that if such judgment or order be affirmed, or the appeal dismissed, the appellant will pay all damages which the respondent may sustain by reason of such stay, not exceeding an amount to be fixed by the judge of the court by which the judgment was rendered or order made, which amount must be specified in the undertaking."

It is the duty of the judge under the said section to fix the amount of the undertaking in order to stay the proceedings pending an appeal, and in case of his refusal, the writ of mandate will lie to compel such action. (*Green v. Hubbard*, 95 Cal. 39, [30 Pac. 202].)

It is said that the petitioner was not aggrieved or injured by the order appointing the receiver, for the reason that the receiver was not directed to take charge of any property belonging to petitioner. It is sufficient to say that in the action brought by Brinkmeyer it was deemed necessary to make the petitioner a party defendant. One of the main objects of the action was to recover real estate held by petitioner, and to have petitioner's deeds thereto delivered up and canceled. The first step toward the accomplishment of the objects so sought by Brinkmeyer was to have a receiver appointed to take charge of all the property of the dissolved corporation, and, among other things, to take or recover and take charge of the real estate held by petitioner under said deeds. The petitioner claims to be the owner of such real estate, and an order authorizing a receiver to bring an action on behalf

of a dissolved corporation to recover such property is such an order as would show the petitioner to be aggrieved by it. The petitioner being a defendant in the suit instituted by Brinkmeyer, and being in possession of the real estate sought to be recovered through the medium of a receiver, certainly had the right to appeal from the order appointing a receiver, and to question the right of the court to make such appointment upon the facts stated in the complaint. Having the right to appeal, it had the right to give an undertaking to stay proceedings under the express provisions of the code.

Let the writ be made peremptory.

Kerrigan, J., and Hall, J., concurred.

[Crim. No. 159. Second Appellate District.—May 5, 1910.]

THE PEOPLE, Respondent, v. WILLIAM P. HOWLAND,
Appellant.

CRIMINAL LAW—MURDER—REFUSAL OF INSTRUCTION—CHARACTER OF DECEASED—EVIDENCE NOT RETURNED—PRESUMPTION UPON APPEAL. Where no evidence is returned upon appeal, it cannot be held prejudicially erroneous, under all circumstances, to refuse an instruction requested by the defendant as to the character of the deceased. For the purpose of supporting the ruling, this court must presume that no evidence was introduced relating to the character of the deceased.

ID.—INSTRUCTION AS TO SELF-DEFENSE INVOLVING EVIDENCE.—When an instruction as to self-defense involves the question whether or not the defendant was called upon in good faith to decline any further struggle, which could only be determined from evidence not returned, it cannot be said to involve error.

ID.—INSTRUCTION USING WORD "MURDER"—ABSENCE OF EVIDENCE.—In the absence of the evidence, it cannot be said that the use of the word "murder," in an instruction instead of "killing," prejudiced the defendant, since his defense may have been an alibi, and he may have admitted that a "murder" was committed.

ID.—PREJUDICIALLY ERRONEOUS INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE—MATTERS OF FACT.—A long argumentative instruction as to the advantages of circumstantial evidence as compared with direct evidence, which contains practically all of the objectionable

comments held prejudicially erroneous, in *People v. Vereneseneckookhoff*, 129 Cal. 497, and which charged the jury as to matters of fact, was improper in any conceivable state of facts not negated by the instruction itself, and is ground of reversal.

ID.—DUTY OF TRIAL JUDGE.—The trial judge must not in his charge, or during the trial, directly or indirectly, assume the guilt of the accused, nor use any language from which the jury can legitimately infer what the views of the judge are upon the issues of fact submitted to them.

ID.—RELATIVE MERITS OF CIRCUMSTANTIAL AND DIRECT EVIDENCE—INSTRUCTION AS TO MATTER OF FACT.—The law declares nothing as to the relative merits of direct and circumstantial evidence. The court cannot argue their relative merit to the jury; and an instruction declaring no settled rule of law, but charging the jury as to matter of fact, is violative of section 19 of article VI of the constitution.

ID.—STATEMENT NOT OF INFERENCE DRAWN BY JURY.—To tell the jury that circumstantial evidence is not likely to be fabricated, and that it has a great advantage over direct evidence, cannot be accepted as a statement of an inference that the jury would be sure to draw.

ID.—STATEMENT OF ABSENCE OF DIRECT EVIDENCE.—Where the jury were informed by the instruction itself that there was no direct evidence of any eye-witness of the homicide, it cannot be assumed that the case for the prosecution was based upon direct evidence, and that the instruction was not prejudicial to the appellant.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. W. R. Guy, Judge.

The facts are stated in the opinion of the court.

David G. Taylor, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

TAGGART, J.—Appellant was informed against for the crime of murder, and upon a plea of “not guilty” was found guilty of murder in the second degree and sentenced to imprisonment in the state’s prison for a term of eighteen years. He appealed in open court from the judgment of conviction and from an order denying his motion for a new trial.

The record on appeal consists of copies of the information, the minutes of the court, the motion for a new trial, the instructions given to the jury, and the instructions requested

by the defendant which were refused by the court; but no evidence is brought up, and no application was made to the trial court to have the reporter's notes transcribed. The errors of the trial court which are presented in support of the appeal are the giving of two instructions by the court, on its own motion, relating to "self-defense" and "circumstantial evidence," and designated respectively as instructions "E" and "K," and its refusal to give an instruction No. 20, relating to "the character of the deceased," at the request of the defendant.

It is apparent at once that in the absence of any evidence we cannot say that it was prejudicial error to refuse to give the latter instruction, as the propriety of giving or not giving an instruction is to be determined by the evidence in the case, except where it would be erroneous in every conceivable state of facts. (*People v. Mendenhall*, 135 Cal. 347, [67 Pac. 325]; *People v. Wong Fook Sam*, 146 Cal. 115, [79 Pac. 848].) For the purpose of supporting the ruling of the court we must presume that no evidence was introduced relating to the character of the deceased.

Instruction "E" does not declare any rule of law except that which may be deduced from the last clause, to wit, "that the defendant could not justify the killing of the deceased under the plea of self-defense, if he himself was the aggressor and had precipitated the conflict." The first element in the instruction, based upon the theory that "defendant had invited the deceased into the room or place where the killing occurred," was entirely immaterial. That "he had threatened to kill the deceased or do him some bodily harm" became material only as connected with the facts and circumstances of the killing. Whether or not the defendant was called upon in good faith to decline any further struggle, as contended by appellant, must be determined from the evidence, and there is no evidence before us.

Instruction "K" is a long argumentative presentation of the reliable character of circumstantial evidence when considered in comparison with direct evidence. It goes beyond the instructions considered in *People v. O'Brien*, 130 Cal. 1, 8, [62 Pac. 297], *People v. Wilder*, 134 Cal. 182, [66 Pac. 228], and *People v. Simmons*, 7 Cal. App. 559, [95 Pac. 48], cited by the attorney general, and contains practically all

the objectionable comments made by the trial judge in the instruction disapproved in *People v. Vereneseneckockockhoff*, 129 Cal. 497, [58 Pac. 156, 62 Pac. 111]. Appellant contends that the instruction is not only erroneous for the reasons stated in the case last cited, but because of the statement therein that "no witness has been produced here who saw the act of *murder* committed, and hence it is urged for the prisoner that the evidence is only circumstantial," whereas in fact the defendant was himself sworn and testified to the circumstances of the killing, and because the court used the word "murder" instead of "killing," and thereby assumed as a matter of fact that a murder had been committed. The minutes disclose that the defendant was sworn as a witness in his own behalf, but, in the absence of a transcript of the evidence, there is nothing from which it can be ascertained whether or not he testified as to the facts of the killing, and the instruction itself says that there was no eyewitness thereto.

In *People v. Besold*, 154 Cal. 363, [97 Pac. 871], it was held that it could not be argued that the trial court, by the use of the words, "in determining the *intention of the defendant* at the time of the transaction," in an instruction given in a case in which the killing was denied by the accused, had assumed, as a fact, that the defendant had in fact done the killing; furthermore, if this language alone was open to such a construction, that, taken with the rest of the charge of the court in that case, it could not be said the trial judge thereby conveyed any intimation to the jury that he believed the defendant had done such killing. We do not agree with the attorney general that this case in any way modifies the rule that the trial judge must not in his charge, or during the trial, directly or indirectly assume the guilt of the accused, nor use any language from which the jury can legitimately infer what the views of the judge are upon the issues of fact submitted to them. (*People v. Williams*, 17 Cal. 142; *People v. Messersmith*, 61 Cal. 246; *People v. Matthai*, 135 Cal. 442, [67 Pac. 694].) In the case before us, owing to the absence of the evidence, we cannot say that the use of the word "murder" prejudiced the defendant, since his defense may have been an alibi, and it may have been admitted that a "murder" was committed.

Instruction "K," however, as hereinabove stated, contains all the objectionable features of the instruction considered in *People v. Vereneseneckockockhoff*, 129 Cal. 497, [58 Pac. 156, 62 Pac. 111]. It contains the following argumentative language criticised in that case: "Circumstantial evidence has this great advantage, that various circumstances from various sources are not likely to be fabricated. . . . Thanks to a beneficent Providence, the laws of nature and the relation of things to each other are so linked and combined together that a medium of proof is often furnished leading to inferences and conclusions as strong as those arising from direct testimony." The entire instruction of more than four pages, of thirty or more lines each of typewritten matter, when taken together, is an argument in support of the strength of a case which relies upon circumstantial evidence to sustain a conviction. The law declares nothing as to the relative probative force of direct and circumstantial evidence, and the court cannot argue to the jury the relative importance of evidence except as that is settled by some rule of law. For it to do so is to violate the plain inhibition of section 19 of article VI of the constitution that, "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." The rule adopted by the supreme court in dealing with instructions based upon various subdivisions of section 2061 of the Code of Civil Procedure of which it is said that even though unconstitutional they "could not possibly have done any harm, for it was merely telling the jury to do certain things which jurors would do without being told" (*People v. Newcomer*, 118 Cal. 263, [50 Pac. 405]; *People v. Wardrip*, 141 Cal. 232, [74 Pac. 744]; *People v. Ruiz*, 144 Cal. 253, [77 Pac. 907]; *People v. Grill*, 151 Cal. 597, [91 Pac. 515]), has no application to this instruction. To tell a jury that circumstantial evidence is not likely to be fabricated, and thus has a great advantage over direct evidence, can hardly be accepted as the statement of an inference that the jury would be sure to draw.

This instruction was improper in any conceivable state of facts not negatived by the instruction itself. By it the jury were informed that there was no direct evidence of the

transaction, and it cannot therefore be assumed that the case for the prosecution was based upon direct evidence, and that the instruction was favorable rather than prejudicial to the defendant.

Judgment reversed and cause remanded for a new trial.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 844. Second Appellate District.—May 7, 1910.]

N. EMMET MAY, Appellant, v. F. S. CRAIG, WALTER J. DESMOND and J. C. TWOMBLEY, Commissioners of Public Works of City of Long Beach, Respondents.

MUNICIPAL CORPORATION—CHARTER CITY—PRIVATE IMPROVEMENTS NOT A "MUNICIPAL AFFAIR."—The construction of improvements upon private property within a charter city is not a municipal affair. The city has no interest or control thereof, except such control as is made necessary for the protection of the public welfare.

ID.—POLICE POWER.—The only power which the city can exercise in relation to such private structures must come from the police power delegated by the constitution to charter cities, which is expressly made subordinate to the general law.

ID.—COMPLAINT FOR MANDAMUS—COPY OF ORDINANCE NOT PRESENTED—JUDICIAL NOTICE.—Where a complaint for *mandamus* does not set forth a city ordinance enacted by the city relating to the construction of buildings therein, the court cannot take judicial notice thereof.

ID.—QUESTION OF CONFLICT OF ORDINANCE WITH GENERAL LAW.—An ordinance may simply exact requirements additional to the general law, which, if true, would not conflict therewith; but if the ordinance undertakes to make lawful that which by the state law is declared unlawful, a conflict would arise, and the ordinance must yield to the general law.

ID.—DUTY OF BOARD OF PUBLIC WORKS TO ISSUE PERMIT—MANDAMUS REFUSED.—In order that the duty should devolve upon the board of public works of the city to issue a building permit, it must be made to appear that no conflict exists between the ordinance and the general law; otherwise the determination of the board in refusing the permit should be sustained, and a writ of mandate thereto was properly refused.

APPEAL from a judgment of the Superior Court of Los Angeles County, refusing a writ of mandate. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Chas. Cassat Davis, for Appellant.

Stephen G. Long, and Percy Hight, for Respondents.

ALLEN, P. J.—Plaintiff by his complaint sought a writ of mandate to compel the board of public works of Long Beach, a charter city, to issue to him a permit for the construction of a certain building by him proposed to be erected within such city. This permit, it is alleged, the board refused to issue, assigning as the sole reason that the plans and specifications intended to control in the erection and construction of such building did not conform to and comply with the requirements of the act of April 16, 1909. (Laws 1909, p. 948.) It is further alleged that the plans and specifications which were presented did conform in every respect to the ordinances of the city regularly enacted with reference to the construction of buildings within such city. It is admitted in the complaint that such plans did not comply with all of the requirements of the general law. A demurrer was interposed to the complaint, which was sustained without leave to amend, and judgment went for defendants, from which judgment this appeal is taken.

It is appellant's contention that all matters with reference to the size and character of buildings constructed or to be constructed within the limits of a charter city, and all regulations relating thereto, are municipal affairs, and under the constitution of this state such charter provisions are superior to the provisions of a general law relating to the same subject. With this contention we do not agree. In our opinion, the construction of improvements upon private property within a city is not a municipal affair. The city has no interest therein or control thereof, except such control is made necessary for the protection of the public welfare, and the only power which the city can exercise in relation to

such private structures must come from the police power delegated by the constitution to such charter cities; and this police power is expressly made subordinate to the general law. The complaint as filed and presented by the record does not contain a copy of the ordinance enacted by the city, and we cannot take judicial notice thereof. It may be that the ordinance simply exacts requirements additional to those of the general law, which, if true, would not be in conflict therewith. (*In re Hoffman*, 155 Cal. 117, [99 Pac. 517].) Upon the other hand, such ordinance may undertake to make lawful that which by the state law is declared unlawful. In that event a conflict would arise, and the ordinance must yield to the general law. That a duty to issue a permit should arise, it must be made to appear that no such conflict exists; otherwise, the determination of the board must be sustained.

Judgment affirmed.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 594. Third Appellate District.—May 9, 1910.]

JOHN T. DAVILA, Respondent, v. FRANK E. HEATH, Appellant; BERKELEY FARM CREAMERY COMPANY, a Corporation, Intervenor, Respondent.

RECEIVER—EX PARTE APPOINTMENT—FAILURE TO REQUIRE BOND TO DEPENDANT—VOID APPOINTMENT.—Where the appointment of a receiver was *ex parte*, and the court failed to require the bond made essential by section 566 of the Code of Civil Procedure, as amended in 1907, the noncompliance therewith rendered the appointment void.

ID.—AMENDMENT MANDATORY.—The effect of the amendment was intended to take all discretion from the court, and to make the requirement of the bond mandatory.

ID.—RIGHT OF APPEAL—ISSUES UNDER PLEADINGS TO BE TRIED.—The appellant was a party aggrieved by the order, and had the right to appeal therefrom. The fact that the answer takes issue upon the complaint, and pleads agency for the intervener, cannot be con-

sidered. The issues may be found for the plaintiff, and can only be determined after trial. Neither the truthfulness of the complaint nor answer can be assumed to deprive plaintiff of the right of appeal.

APPEAL from an order of the Superior Court of Alameda County, appointing a receiver. Harry A. Melvin, Judge.

The facts are stated in the opinion of the court.

Dudley Kinsell, for Appellant.

E. H. Wakeman, and Abe P. Leach, for Plaintiff-Respondent.

John S. Partridge, and C. C. Hamilton, for Intervenor-Respondent.

CHIPMAN, P. J.—This is an action in which a partnership relation is averred in the complaint and an accounting is prayed for. Upon the filing of the complaint the court made and entered its order, *ex parte*, appointing a receiver “upon giving a bond . . . for the faithful performance of his duties as such receiver and upon taking his oath of office in the manner required by law.” The complaint was filed August 27, 1908; the order appointing the receiver was made August 31, 1908, and on September 2, 1908, the receiver’s bond was approved and filed and his oath of office duly taken. It appears from the clerk’s certificate “that no other or further bond or undertaking was ever filed by the receiver in said action or on his behalf, and that no order was ever made by said court fixing the amount of, or requiring from said applicant or plaintiff an undertaking, and that no undertaking was ever filed by or on behalf of said applicant, and that no notice of the hearing of the application for a receiver is on file in this office.” Defendant Heath appeals from the order.

Section 566 of the Code of Civil Procedure, among other things, provides as follows: “If a receiver is appointed upon an *ex parte* application, the court, before making the order, must require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the

effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry upon his docket, in case such applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking." This section of the code, as it then stood, was amended in 1907 (Stats. 1907, p. 710), and the word "may" was changed to "must," so that the statute now declares that if a receiver is appointed upon an *ex parte* application, "the court, before making the order, *must* require from the applicant an undertaking," etc. In *Fischer v. Superior Court*, 110 Cal. 129, 139, [42 Pac. 561, 563], the supreme court, speaking through Mr. Justice McFarland, observed parenthetically: "We may remark, however, that the appointment of a receiver to take property and business out of the hands of persons in possession and claiming ownership thereof, without requiring a bond from the plaintiff in the action, would in most cases be a gross abuse of discretion." This was said before the statute was amended, and when the requirement that a bond should be given by the applicant before the appointment of a receiver at his instance was in some degree discretionary. The amendment, it seems to us, was intended to take from the court this discretion and make the requirement mandatory, and that noncompliance with the statute would render the appointment void.

Plaintiff has moved to dismiss the appeal on the ground that defendant is not an aggrieved party. In support of his motion he has attached thereto a copy of defendant's answer and also the answer of intervenor, Berkeley Farm Creamery Company, the latter having been filed September 12, 1908, and the former September 17, 1908, and both some days after the receiver was appointed. The point made by plaintiff is that the sworn answer of defendant avers that the transactions complained of by plaintiff were with the intervenor, in which defendant was acting only as manager and agent of the creamery company and had no personal interest therein. We cannot assume the truthfulness of the averments either of the complaint or the answer. The issues there presented must be tried. Upon plaintiff's showing defendant is a necessary party to his action. So far as we can now know the trial

may disclose the facts to be as plaintiff avers. Appellant cites *Amory v. Amory*, 26 Wis. 152, where the appeal was dismissed on the ground here alleged. But in that case the proof that appellant had no interest in the controversy was the decree of a court determining the fact.

It would be strange, indeed, if, in endeavoring to escape the consequences of a possible judgment against him, the defendant makes averments inconsistent with or contradictory of the averments of the complaint, he thereby ceases to be an aggrieved party and deprives himself of the right of appeal. There is no merit in the point.

The order appointing the receiver was unauthorized, and is therefore reversed.

Burnett, J., and Hart, J., concurred.

[Civ. No. 765. Second Appellate District.—May 9, 1910.]

HENRY W. HOWARD, Respondent, v. W. I. GALBRAITH,
Appellant.

CONTRACTS—REFUSAL TO ACCEPT PERFORMANCE.—A refusal to accept performance of a contract before the arrival of the time for performance is the equivalent of a refusal to perform, if not withdrawn before the time for performance.

CONTRACT TO REPURCHASE STOCK—SUPPORT OF FINDINGS—EXCUSE FOR TENDER AND DEMAND.—A contract to repurchase stock at the expiration of a year from the date of purchase is valid. But the support of findings showing the want of ability or disposition of defendant to perform the contract, and the equivalent of his refusal to perform the same, not withdrawn before the expiration of the year, establishes a legal excuse for exact tender and demand for performance by the plaintiff.

ID.—DEMAND BY TELEPHONE BEFORE EXPIRATION OF YEAR—DECLARED INABILITY.—Where the plaintiff made demand by telephone, a short time prior to the expiration of the year, in reply to which defendant declared his inability to perform, and stated that he was not in position to comply with his contract to repurchase the stock, even if the exact limitation of one year from the date of the contract is to be considered, the variance would be immaterial, in view

of the answer of defendant to the telephone notice by plaintiff disclosing a refusal of defendant to perform.

ID.—LEGAL EQUIVALENT OF DEMAND AND REFUSAL—RELEASE FROM REQUIREMENT.—The answer to such notice shows the legal equivalent of a demand for performance by the plaintiff and the refusal of performance by the defendant, and the release of the plaintiff from any further obligation to make demand.

ID.—BURDEN UPON DEFENDANT.—If the defendant wished to hold the plaintiff to exact performance, the burden is upon him to express a willingness to carry out the contract.

ID.—STOCK PURCHASED AS AN INVESTMENT—REPRESENTATIONS BY DEFENDANT—CONTRACT TO REPURCHASE.—*Held*, that the contract between the parties was, in effect, that plaintiff purchased the stock as an investment upon the representations by defendant that it was a good investment, and that defendant agreed that if plaintiff was not satisfied with the investment after a year had elapsed, he would purchase the stock and take it off his hands at the price paid.

ID.—PLAINTIFF'S CAUSE OF ACTION—LAPSE OF YEAR—NOTICE OF DESIRE TO SELL.—In such case plaintiff had no cause of action against the defendant until he awaited the passage of the year and then notified defendant that he desired to sell the stock.

ID.—RIGHT OF ACTION NOT PREJUDICED BY NEW DEMAND AFTER YEAR AND NOTICE OF DESIRE TO SELL.—Plaintiff did not prejudice his right of action by renewing his demand after the year, and notifying defendant that he desired to sell the stock, notwithstanding defendant's previous declaration of inability to perform. The renewal of the notice and demand was not an offer of performance after a specified time fixed therefor, within section 1490 of the Civil Code, but was a further notice and demand, after the default of defendant upon which to predicate his action.

ID.—DEFENDANT NOT IN DEFAULT WITHOUT NOTICE OF DESIRE TO SELL AFTER YEAR—REASONABLE TIME.—The defendant was not in default until plaintiff notified him of his desire to sell after the year expired. This he might do within a reasonable time thereafter.

ID.—SUPPORT OF FINDINGS—REPRESENTATIONS OF DEFENDANT INDUCING PURCHASE—RELIANCE UPON PROMISE TO REPURCHASE.—Though the evidence was curtailed, there was sufficient evidence to support the findings that plaintiff's purchase of the stock was induced by representations made by the defendant, and that plaintiff relied upon the promise and agreement of defendant and was induced thereby to purchase the stock.

ID.—CURTAILING OF EVIDENCE CAUSED BY LETTER OF DEFENDANT AGREEING TO PURCHASE—APPELLANT NOT PREJUDICED.—Where the curtailment of the evidence was caused by confining it after the date of a letter by defendant agreeing to purchase, the defendant appealing could not be surprised or misled by the ruling of the court, and no prejudice to him therefrom can be presumed.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. George E. Church, Judge Presiding.

The facts are stated in the opinion of the court.

Oscar C. Mueller, for Appellant.

Johnstone Jones, and R. P. Jennings, for Respondent.

TAGGART, J.—Action to recover on an agreement to purchase mining stock. Judgment was for plaintiff and defendant appeals from judgment and order denying motion for a new trial.

On May 2, 1907, plaintiff purchased five hundred and fifty shares of the capital stock of the Greene Gold Silver Company upon the guaranty and agreement of defendant that the latter would take said shares of stock off plaintiff's hands at the expiration of one year from the date of said purchase at the price paid for them by plaintiff. Later, to wit, on May 6, 1907, defendant in a letter written to plaintiff confirmed this agreement in the following words: "Remember I guaranteed to take your stock off of your hands at the expiration of one year for the amount you paid for it, providing you desire to sell." Plaintiff paid \$928.90 for the stock, and testified that he notified defendant on two or three occasions about one year after his purchase of the stock that he desired to sell and demanded that defendant perform his part of the agreement. The first occasion was by telephone a short time prior to the expiration of the year; the next time was by letter about the end of the year, to which plaintiff received no reply, and a letter under date of July 17, 1908, written by plaintiff's attorney, making the demand for him and tendering the certificates of stock representing the shares. The telephone demand prior to the expiration of the year and the reply thereto, as stated by plaintiff, were as follows: "Well, I told him my note was coming due and that I would expect him to take the stock and pay me what was agreed. He said in reply that he couldn't do it—wasn't in a position to do it; he made no other excuse or reason for not buying it at that time." The letter by which the second demand was

made was not produced and no copy thereof introduced; the contents of it were not proven, and defendant testified he never received it. Plaintiff failed to fix the date of its mailing any more definitely than that it was "just about the end of the year." The certificates of stock were deposited in court by plaintiff.

It is urged by appellant that the finding of the court to the effect that the plaintiff notified the defendant of his desire to dispose of the stock, demanded that the defendant perform his agreement, and offered to deliver the stock to defendant, *at the expiration of one year from the date of said purchase*, is not supported by the evidence. Invoking section 1490 of the Civil Code and *Glock v. Howard*, 123 Cal. 1, 20, [69 Am. St. Rep. 17, 55 Pac. 713], he contends that the obligation relied on fixes a time for its performance, and that the testimony of plaintiff shows that he made the tender and demand both *before* and *after*, but not *at* the expiration of, the year. If the contract be one in which the exact time is to be considered, the words "at the expiration of one year" should be interpreted to mean one year from May 2, 1907, the date of the purchase of the stock, rather than from May 6, 1907, the date of the letter confirming the agreement, which is alleged in the complaint to be the date of demand and tender made. If we were to regard the exact limitation of one year as a proper construction of the agreement, this variance would be immaterial, as the evidence discloses a refusal to perform by the defendant by his answer to the telephone notice given by plaintiff. This was the legal equivalent of an offer and refusal, and it was not withdrawn by defendant prior to the date when performance was due. (Civ. Code, sec. 1515.) This telephone conversation is located by plaintiff at "about," but "prior" to, the expiration of the year, and plaintiff notified defendant that he would expect him to take the stock as agreed, and defendant replied that he could not do it, and there is no evidence that he ever notified plaintiff that his inability or indisposition to comply with his agreement was removed at any time prior to the date of performance. Plaintiff was thereby released from the requirement that he make demand and offer at the exact date, if such demand and offer were otherwise necessary. This statement that he could not, and would not, be able to meet his obligation naturally

tended to induce plaintiff to omit performance, as it notified him in advance that defendant couldn't take the stock at the expiration of the year, even though a tender was made and the plaintiff expected him to do so. After he had so stated the burden was upon the defendant to show that prior to the time he expressed a willingness to carry out the contract, if he wished to hold plaintiff to an exact performance. (Civ. Code, secs. 1440, 1515.)

The decisions of the supreme court in *Hanson v. Slaven*, 98 Cal. 379, [33 Pac. 266], and *Glock v. Howard*, 123 Cal. 1, [69 Am. St. Rep. 17, 55 Pac. 713], are not inconsistent with this view. Further than this, the contract here introduced shows upon its face that it was not one to deliver stock within a specified time or at a specified date at a price named. The plaintiff was induced by defendant to purchase the stock upon the representation that it would become valuable as an investment. The letter of May 6th stated: "The Greene Gold Silver is the largest mining proposition in the world and whatever report is signed by W. C. Greene is *true*. It is my opinion inside of three years that stock will be selling at not less than twenty-five dollars for share." While this letter was written after the purchase, it was in effect but a reaffirmance of the statements testified to by the plaintiff as made to him by defendant before the stock was bought. The plaintiff testified: "I knew nothing of this company until the defendant spoke of it. . . . Dr. Galbraith advised me to purchase stock in this company saying that he believed it to be a first-class investment. . . . He telegraphed me . . . to buy all the Greene Gold and Silver—I told him that if I bought stock I would have to borrow some money to buy it, and he said very well, he would advise me to do it, and furthermore, that he would agree that after a year, if I was not satisfied with the stock, he would take it off my hands at exactly what I paid for it." In effect, the contract was that plaintiff was to purchase the stock as an investment, upon defendant's representations, and if after a year had elapsed plaintiff was not satisfied with the investment, defendant would take the stock off his hands at the price paid. In other words, plaintiff had no cause of action against defendant until he awaited the passage of the year and then notified defendant that he desired to sell. Plaintiff did not prejudice his right of action

by renewing his demand and notifying defendant that he desired to sell the stock after being told by defendant, before the year expired, that he could not—would not be in a position to take the stock at the exact expiration of the year. The renewal of the notice and demand was not an offer of performance after a specified time fixed therefor, within the meaning of section 1490 of the Civil Code, but a further notice and demand, after defendant was in default, upon which to predicate his action. The defendant was not in default until plaintiff notified him of his desire to sell after the year expired. This he might do within a reasonable time thereafter. (Civ. Code, sec. 1491.)

While the trial court at one time, upon the objection of defendant, and the theory that the letter embodied the contract, somewhat curtailed the introduction of evidence by plaintiff as to the representations made by defendant to induce plaintiff to purchase the stock, nevertheless, there is abundant evidence to sustain the findings of the court that representations were made by defendant for the purpose of inducing plaintiff to buy the stock, and, also, that the plaintiff relied upon the promise and agreement of defendant and was induced thereby to purchase the stock. There is no contention that appellant was in any way misled or surprised by this ruling of the court, and no prejudice to him therefrom can be presumed.

Judgment and order affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 8, 1910, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 7, 1910.

[Civ. No. 679. Third Appellate District.—May 9, 1910.]

A. M. SHEAKLEY, Appellant, v. T. A. NELSON, Respondent.

JUDGMENT—DISMISSAL OF APPEAL.—An appeal from a judgment taken more than two years after its entry cannot be considered, and must be dismissed.

ID.—ORDER DENYING NEW TRIAL—REVIEW UPON APPEAL.—Upon an appeal from an order denying a new trial, neither the sufficiency of the pleadings nor of the findings to support the judgment can be reviewed upon appeal.

ID.—SUPPORT OF FINDINGS—CONFLICTING EVIDENCE—CREDIBILITY OF WITNESSES.—*Held*, that the findings were sufficiently supported by the evidence, though conflicting, and that the credibility of the witnesses was for the determination of the trial court.

ID.—ACTION FOR SALE OF STOCK—REFORMATION OF AGREEMENT TO SHOW SALE—SUPPORT OF FINDINGS.—*Held*, that the nature of the contract sued upon was for the sale of stock; that the contract was properly reformed to show a sale; that the charge conformed to evidence of what the parties meant by the contract; and that the findings of a sale are supported by the evidence.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial. C. W. Norton, Judge.

The facts are stated in the opinion of the court.

Paul McDonald, H. E. Monroe, and A. H. Carpenter, for Appellant.

Clary & Louttit, and Thomas H. Louttit, for Respondent.

CHIPMAN, P. J.—The complaint sets forth a written contract, relating to the transfer of certain shares of the capital stock of the Hercules Manufacturing Company, a corporation, by plaintiff to defendant, the plaintiff claiming that the shares were merely a pledge to secure the payment of money advanced by defendant to pay certain assessments on said shares, the defendant claiming in his answer that the intention of the contract was to effect a sale, and praying its reformation so that it would correctly express such intention.

The court found the facts to be in accordance with defendant's contention and rendered judgment against plaintiff. Judgment was made and entered March 23, 1907, and plaintiff appealed therefrom on April 6, 1909, more than two years after the entry thereof.

The appeal from the judgment cannot be considered, and may be dismissed. (*Brownlee v. Rainer*, 147 Cal. 641, [82 Pac. 324].)

On the appeal from the order denying plaintiff's motion for a new trial, neither the sufficiency of the pleadings nor the findings in support of the judgment can be considered. (*Kaiser v. Dalto*, 140 Cal. 167, [73 Pac. 828]; *Holmes v. Warren*, 143 Cal. 457, [78 Pac. 954].)

No errors of law are pointed out in appellant's brief, and there remains only the inquiry, Did the evidence support the findings?

The transaction, as found by the court, briefly stated, was as follows: On April 8, 1903, plaintiff was the owner of 14,090 shares of the capital stock of the Hercules Manufacturing Company, and, on that day, plaintiff sold and transferred the same to defendant for the consideration of \$1,500; that on said day plaintiff and defendant entered into a written agreement, the intention of which, through mutual mistake, was not truly expressed; "that it was the intention of said plaintiff and said defendant to enter into an agreement of sale of said 14,090 shares of the capital stock of the Hercules Manufacturing Company, a corporation, and it was the intention of said plaintiff and said defendant to enter into an agreement under the terms of which defendant as an additional consideration to him moving from said plaintiff for the transfer and sale by plaintiff to defendant of said 14,090 shares of said stock, was to pay for said plaintiff to said Hercules Manufacturing Company, a corporation, in addition to said sum of Fifteen Hundred Dollars, on account of any subsequent assessment that might be levied against the stock of said plaintiff, the sum of One Thousand Dollars."

The agreement was reformed to express what the evidence tended to show was the intention of the parties. In the written contract the words "and sell" were inserted by the court after the word "transfer." After the provision, "and the said T. A. Nelson will pay such assessments as the stock of

said A. M. Sheakley may be charged with, provided that the total sum so paid shall not exceed \$2,500," there was added by the court, "including the sum of \$1,500 agreed to be advanced for the payment of the assessment already advanced." These changes conformed to the evidence which was explanatory of what the parties meant by the language used in the contract, when first written, rather than as introducing any new feature. It was further found that said shares were not intended as security for the repayment by plaintiff to defendant of the sum of \$1,500, or any other sum, as alleged in the complaint, and that defendant did not loan to plaintiff nor did plaintiff borrow from defendant said sum or any other sum.

The evidence is in sharp conflict, but there is sufficient to support the findings. Our attention is called to certain phases of the transaction as disclosed by the testimony of the witnesses and the records of the corporation, from which it is contended by appellant that the findings of fact should have been favorable to his contention. But these matters rest chiefly upon the details of the transaction and subsequent happenings between the parties, and their mutual relation to the corporation, as given by witnesses whose credibility was a matter to be determined exclusively by the trial judge. Appellant points out no fact or circumstance, upon which the findings support respondent's view of the transaction, which can be said to be inherently or at all improbable or unreliable, or which would justify an appellate tribunal in reaching a conclusion from the facts different from that arrived at by the learned trial judge.

In a word, the evidence showed that plaintiff was owner of 37,544 shares of the corporation; an assessment had been made which called for a payment by plaintiff of \$1,500 on plaintiff's shares; he found himself unable to meet the assessment and applied to defendant for relief; defendant agreed to purchase 14,090 of plaintiff's shares and pay this assessment; the shares were accordingly transferred to defendant; after this agreement was made plaintiff became fearful that another assessment would be made, and defendant agreed to meet plaintiff's part of it not to exceed \$1,000 additional to the \$1,500 already agreed to be paid by him. It appeared that

defendant was secretary of the company and was familiar with its affairs, and did not believe that another assessment would be made, but was willing, to allay plaintiff's fears, to take the chance. The explanation made by defendant and his account of the transaction, which was very fully given, was accepted by the court, and we find nothing in the record to discredit the defendant's narrative of the facts thus accepted.

The appeal from the judgment is dismissed and the order denying new trial affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 7, 1910.

[Civ. No. 639. Third Appellate District.—May 9, 1910.]

RECLAMATION DISTRICT NO. 765, Respondent, v. ANNA
McPHEE, Appellant.

RECLAMATION DISTRICT—DE JURE CORPORATION NOT SHOWN—INSUFFICIENT PUBLICATION.—Where the affidavit of publication of a petition for the formation of a reclamation district shows that the publication of notice of the hearing was insufficient to justify the hearing of the petition, it is insufficient to show a reclamation district *de jure*.

ID.—FORECLOSURE OF ASSESSMENT LIEN—DE FACTO CORPORATION—VALIDITY NOT COLLATERALLY ASSAILABLE.—In an action by a reclamation district to foreclose the lien of an assessment, where the district *de facto* is established, its existence cannot be collaterally assailed.

ID.—NATURE OF CORPORATION DE FACTO.—A corporation *de facto* exists where a number of persons have organized and acted as such corporation, have conducted their affairs to some extent through the officers usually employed by corporations, and have assumed the appearance of a legal corporate body.

ID.—EVIDENCE RECEIVED WITHOUT OBJECTION.—No objection having been made to evidence tending to prove a *de facto* corporation, upon the ground that it was not within the issues, it may be considered under the averments denied.

ID.—LAPSE OF TIME IMMATERIAL.—It is not necessary that some particular period of time should elapse in order to show the *de facto* existence of a corporation. Such existence depends rather upon what has been done under and by virtue of the organization than upon the length of time that may elapse after its inception.

ID.—DE FACTO ORGANIZATION BASED ON DISTINCT GROUNDS.—*De facto* organizations are upheld on distinct grounds from those on which a *de jure* organization rests.

ID.—RIGHT OF DE FACTO CORPORATION TO EXIST—RIGHT DETERMINABLE ONLY IN QUO WARRANTO.—Where the right of a *de facto* corporation to exist is shown, its right to exist can be determined only upon *quo warranto* proceedings.

ID.—POWER OF CORPORATION DE FACTO.—A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the permanent authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even against the state, except in proceedings to arrest its usurpation of power, its acts are to be treated as efficacious.

ID.—RECLAMATION DISTRICTS DE FACTO—VALIDITY OF ASSESSMENT.—Reclamation districts, authorized under the Wright act, are public corporations, whether *de jure* or *de facto*. That is a matter which cannot be inquired into collaterally; and the validity of the lien of an assessment thereof in no way rests upon the *de jure* character of the reclamation district.

APPEAL from a judgment of the Superior Court of Yolo County. K. S. Mahon, Judge.

The facts are stated in the opinion of the court.

Hudson Grant, for Appellant.

A. L. Shinn, and Arthur Huston, for Respondent.

CHIPMAN, P. J.—The judgment in this case was reversed after a careful and somewhat extended discussion of the points involved, by Justice Burnett (10 Cal. App. Dec. 45). Upon the petition of plaintiff a rehearing was ordered and the cause is again before us for consideration.

In our former opinion we held that the board of supervisors was without jurisdiction to create the district, for the reason that there was a failure to publish the petition for its organization for the statutory period; and, further, that the

validity of the organization could be attacked in this action. Since the opinion was filed the decision of the supreme court in *Keech v. Joplin*, 157 Cal. 1, [106 Pac. 222], has been called to our attention, which, it is claimed, holds that the organization of the district can only be questioned by *quo warranto*. Upon this point, as well as upon the sufficiency of the publication of the petition, the rehearing was particularly urged.

The action is to foreclose the lien of an assessment levied by the complaining district upon the lands of the defendant, Anna McPhee.

1. If the case were to turn wholly upon the sufficiency of the publication of the petition and notice of hearing thereof, as required by section 3447 of the Political Code, we should still incline to adhere to our former opinion. The statute reads: "The petition must be verified by the affidavit of one of the petitioners and must be published for four weeks next preceding the hearing thereof in some newspaper published in the county in which the lands are situated . . . and an affidavit of publication must be filed with such petition."

Plaintiff, at the trial, introduced the proof of publication which was admitted over defendant's objection as insufficient to show compliance with the statute. No other proof was offered on that question. The hearing, as fixed by the notice published with the petition, was set down for April 4, 1905, at 10 o'clock A. M., as the time also for hearing the petition and the order purporting to form the reclamation district, was made and entered on that day. The affidavit of publication showed the following: "That the Notice of Petition, a true and correct copy of which is hereto annexed . . . has been printed and published four weeks in said newspaper, commencing on March 11, 1905, and ending on April 3, 1905, both days inclusive, and in the regular and entire issue thereof, as follows." Then follow the days in March and April on which the notice was published, commencing March 11th and ending April 3d. Did this satisfy the statute which required the petition to be "published for four weeks next preceding the hearing thereof"? "A week consists of seven consecutive days." (Pol. Code, sec. 3258.) The code rule of computation (Code Civ. Proc., sec. 12) excludes March 11th and includes all of April 3d, which would make the earliest day for the hearing April 8th, if the publication must con-

tinue for four weeks next preceding the hearing. That due publication of the petition and notice of the hearing is jurisdictional cannot be doubted. (*Williams v. Sacramento Co.*, 58 Cal. 239; *In Matter of Central Irr. Dist.*, 117 Cal. 390, [49 Pac. 354].) In *Williams v. Board of Supervisors*, 58 Cal. 237, which was a case similar to the one here, the day fixed for the hearing was June 17th, and the publication was made May 20th, 27th, June 4th and 12th, but was held insufficient. The court said: "It is obvious that the petition could not be published for four weeks *next preceding* its hearing, unless it was published for four *consecutive* weeks. And inasmuch as the petition could not be published *at least once* a week for that period, and since the statute defines a week to be seven consecutive days, it necessarily results that it could not be published for four weeks next preceding its hearing unless it was published at least once every seven days for the period of four weeks next preceding the hearing." (See, also, *Savings & L. Soc. v. Thompson*, 32 Cal. 347; *Misch v. Mayhew*, 51 Cal. 514; *Hagenmeyer v. Mendocino Co.*, 82 Cal. 214, [23 Pac. 14]; *Derby v. City of Modesto*, 104 Cal. 515, [38 Pac. 900].) In *Sherwood v. Wallin*, 154 Cal. 735, [99 Pac. 191], the statute required the publication to be "at least two weeks before such action in some newspaper," etc. The meeting was set for March 4th. The publication of notice was made on February 10th and February 17th, one insertion on each date, in a daily newspaper, which was held sufficient, for the court said: "It may be assumed [thus implying] that the language of the statute is such as to require a publication once a week for two weeks before the day noticed for the meeting," and this was done.

2. Could the validity of the corporation be attacked in this proceeding?

The position of respondent is that section 803 of the Code of Civil Procedure has prescribed a remedy for usurpation of corporate functions by *quo warranto*, and that "such remedy is exclusive of all other remedies, except in those special cases where another remedy is also given by statute, such as election contests."

Our attention is also called to section 358 of the Civil Code, which provides as follows: "The due incorporation of any company claiming in good faith to be a corporation *under this*

part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party; but such inquiry may be had at the suit of the state on information of the attorney general." As to this latter point it might be answered that the plaintiff is not claiming to be a corporation "under this part," i. e., part IV of the Civil Code. But whether applicable or not, we are still confronted with the claim made that a *de facto* corporation was shown, and that the existence of such a corporation cannot be collaterally questioned, where it is in good faith exercising the functions of a corporation. Apart from section 358 of the Civil Code, we understand that the rule contended for by respondent is the same where either a *de jure* or a *de facto* corporation is shown. Here "due incorporation" was averred in the complaint and denied in the answer. In our former opinion it was held that the "due" incorporation, i. e., a *de jure* corporation, was not shown, and that as there was no evidence introduced specifically addressed to the establishment of a *de facto* corporation, there was a failure of proof of any corporation. It did appear, however, that a petition for the formation of the district was signed and notice of its hearing given, though insufficient as to time of publication; at the appointed time it was heard, and upon the hearing the board of supervisors made and entered its order "purporting to form the said reclamation district," and "ordered that the said petition and application hereto [i. e., to the order] attached be, and the same is hereby approved." The record further shows: "Thereupon the plaintiff offered in evidence (over objection of defendant to the jurisdiction of the board of supervisors) the papers filed in the Matter of said Reclamation District, showing the appointment of trustees, and other proceedings, regular in form, terminating with the assessment list, which showed an assessment of \$1,709.90 against the lands above described as tracts 5 and 6." In *Martin v. Deetz*, 102 Cal. 55, 65, [41 Am. St. Rep. 151, 36 Pac. 368, 371], the court said: "An averment of the existence of a *de facto* corporation is as issuable as an averment of the existence of a corporation *de jure*; and its existence does not consist in the mere assertion of its existence in a pleading. What is a corporation *de facto*? It exists

where a number of persons have *organized and acted* as a corporation; have conducted their affairs to some extent, at least, by the methods and through the officers usually employed by corporations; and have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body." In the case here no claim is made that the proceedings were not taken in good faith; no objection was made to the evidence showing what the corporation had done in pursuance of the purposes of its organization, except that the proof of publication of notice was insufficient. The answer denied that the district "was or is duly or at all, organized as a reclamation district; deny that it constitutes a public corporation, or public agency, under, pursuant to, or in accordance with, the statutes of California, or any state; or under the by-laws adopted by said reclamation district, or at all." No objection having been made to evidence tending to prove a *de facto* corporation upon the ground that it was not within the issues, we may consider it under the averments and denials. It is not necessary that some particular period of time should elapse in order to show a *de facto* existence. Such existence depends rather upon what has been done under and by virtue of the organization than upon the length of time which may elapse after its inception. The definition of a *de facto* corporation, given in *Martin v. Deetz*, 102 Cal. 55, [41 Am. St. Rep. 151, 36 Pac. 368], would seem to have been met in the present case. We have then the question: "Can the validity of a *de facto* reclamation district be attacked collaterally? In answering this question the fact that the petition was not published as required by law seems to me to be a negligible quantity. That infirmity goes to the *de jure* organization and does not preclude the idea of an existence *de facto*. *De facto* organizations are upheld upon grounds distinct from those upon which a *de jure* organization rests. It was held in *Martin v. Deetz*, 102 Cal. 55, [41 Am. St. Rep. 151, 36 Pac. 368], that where it appeared that the corporation has no *de facto* existence, its right to exist may be attacked collaterally in a private action. But where *de facto* existence is shown, we understand the rule as enunciated in that case to be otherwise, and its right to exist can be determined only upon *quo warranto* proceedings. It has been so held in several cases as to private corporations under

section 358 of the Civil Code. (*Martin v. Deetz*, 102 Cal. 55, [41 Am. St. Rep. 151, 36 Pac. 368]; *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, [22 Pac. 76]; *First Baptist Church v. Brankham*, 90 Cal. 22, [27 Pac. 60]; *People v. Dole*, 122 Cal. 486, [68 Am. St. Rep. 50, 55 Pac. 581].) In *People v. La Rue*, 67 Cal. 526, 530, [8 Pac. 84, 87], which was the case of a swamp land district, the court said: "A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious." *Quint v. Hoffman*, 103 Cal. 506, [37 Pac. 514, 777], was an action to enjoin the sale of lands for assessments levied under an irrigation district organization. Said the court: "An irrigation district of this character is a public corporation, formed under a general law, and its object is the promotion of the general welfare. (*People v. Selma Irr. Dist.*, 98 Cal. 206, [32 Pac. 1047], and cases there cited.) Corporations organized under the act of the legislature, properly known as the Wright act, being public corporations, it is immaterial whether they be corporations *de jure* or *de facto*. That is a matter which cannot be inquired into upon collateral attack; and in a case like the present, where the validity of an assessment levied by such a corporation is the subject of litigation, the validity of such assessment does in no way rest upon the fact of the *de jure* character of the corporation. This principle must be considered settled law in this state. (*Dean v. Davis*, 51 Cal. 411; *Reclamation Dist. v. Gray*, 95 Cal. 601, [30 Pac. 779]; *Swamp Land Dist. No. 150 v. Silver*, 98 Cal. 53, [32 Pac. 866].)" See *People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 484, [61 Pac. 86].) The principle laid down in *Quint v. Hoffman*, 103 Cal. 506, [37 Pac. 514, 777], and *Reclamation Dist. v. Turner*, 104 Cal. 335, [37 Pac. 1038], was approved in *Keech v. Joplin*, 157 Cal. 1, [106 Pac. 222]. Said the court: "The evidence abundantly shows that the district has been organized, and that it has been acting as a district. In other words, that is a *de facto* district. It is a public corporation of a

similar character to irrigation districts and reclamation districts. The law is well settled that the validity of the organization of such a district cannot be questioned by private individuals, but only in a proceeding in *quo warranto* at the suit of the state."

At the former hearing the stress of the argument was placed upon the question whether a *de jure* district had been created, and our decision rested mainly upon the right of defendant to call in question its validity where it clearly appeared, upon plaintiff's own showing, that the supervisors were without jurisdiction. It was assumed that plaintiff had not shown *de facto* existence. Inasmuch, however, as this fact now appears to us to have been established, we think that the decisions of our supreme court compel a conclusion favorable to plaintiff's contention.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 8, 1910.

Beatty, C. J., Angellotti, J., and Sloss, J., dissented from the order denying a rehearing in the supreme court.

[Civ. No. 709. Third Appellate District.—May 12, 1910.]

A. SWANSON, Appellant, v. JOHN WILSEN, ANDREW FOER, CHRIS NILSON, NELS NEWMAN, and C. HAINER, Partners Under the Firm Name of JOHN WILSEN & CO., Respondents.

INJUNCTION—DISPUTED DEMAND—PAYMENT INTO COURT—CONTRACT BETWEEN PARTNERS—MERE MONEY ALLOWANCE—JURISDICTION OF APPEAL.—Where the action was brought to enjoin a construction company from paying a residue to partners defendants, who had completed a contract to prepare a section for a railroad, and the equitable element was eliminated by the payment of the money into court, and the plaintiff is an assignee of a partner who had re-

fused to complete the contract, and had quit work, and the case did not involve a settlement of the partnership business, but a mere money demand by such assignee, as to the amount due his assignor for work done, under a contract between the partners, and the only judgment rendered for plaintiff was for the value of the work and labor done by his assignor, this court has jurisdiction of an appeal therefrom.

ID.—AGREEMENT OF PARTNERS AS TO WAGES FOR QUITTERS—SUPPORT OF FINDING.—Where the evidence showed an original agreement of seven partners to complete the section and share the profits equally, but also showed that afterward, when one of the partners quit the work and refused to do more, they settled with him on a basis of wages at three dollars per day, less expenses advanced, and it was then agreed between all of the remaining partners, including plaintiff's assignor, that if any other one should quit the work before it was done he should receive the same *per diem*, less expenses, the court properly found, upon sufficient evidence, that the recovery of the plaintiff, as assignee of a quitter of the work before it was done, was limited to the same *per diem*, less such expenses.

ID.—AGREEMENT NOT REQUIRED TO BE IN WRITING—EVIDENCE.—The understanding between the partners as to how quitters should be paid was not required to be in writing, and could be determined upon at any time. Evidence as to how the first quitter was settled with was admissible as tending to corroborate the agreement then made between all the remaining partners that the rule adopted in his case was to govern if others should quit the work.

ID.—AGREEMENT AS TO QUITTERS NOT INEQUITABLE—PROPER SHARERS IN PROFITS.—The agreement as to quitters found by the court was not unreasonable or inequitable. On the contrary, it was but just that the five partners who stood by the contract to construct the section to its completion, and took the risks of loss in the business, should alone share in whatever profits might result from their fidelity to their obligations.

ID.—CODE SECTION INAPPLICABLE.—Section 2403 of the Civil Code, providing that, "In the absence of any agreement on the subject, the shares of partners in the profit and loss of the business are equal," is only intended to reach cases in the absence of any agreement between the partners relating to the shares of partners, and does not apply to an equitable agreement between the partners as to the share of quitters in a work undertaken by the partnership.

ID.—APPEAL—REVIEW OF EVIDENCE—CONFLICT.—Where the evidence is conflicting, the findings of the trial court will not be disturbed upon appeal.

APPEAL from a judgment of the Superior Court of Butte County, and from an order denying a new trial. John C. Gray, Judge.

The facts are stated in the opinion of the court.

H. D. Gregory, for Appellant.

George Foster Jones, for Respondents.

CHIPMAN, P. J.—The Utah Construction Company was made a party defendant and was sought to be enjoined from paying over certain money to the other defendants. The company paid the money into court and was no longer interested in the suit, and as to it the action was treated as dismissed. The equitable element of the case being thus eliminated, the remaining issues were within the jurisdiction of this court to which the appeal was taken. The amount of money involved and the definite amount thereof to which plaintiff laid claim appear in the complaint, and these amounts are not denied to be correct, the issue presented by the answer being, that plaintiff is entitled only to a certain part, to wit, \$275.15, of the sum claimed by plaintiff. Had the case involved an accounting among the copartners and the settlement of the copartnership business, thus requiring the aid of the equitable powers of the court, we would have been without jurisdiction upon direct appeal. (Const., art. VI, sec. 4.)

Plaintiff's action is to recover the sum of \$1,441.44, as assignee of one John Olsen, as the latter's share of the earnings of an alleged copartnership consisting of defendants, the said Olsen and one Antone Carlson—seven in all. These seven men entered into a written agreement describing themselves therein as "a partnership doing business under the firm name of John Wilsen & Co., the party of the first part," with the Utah Construction Company, party of the second part, bearing date December 1, 1907. By this agreement they—first parties—agreed to do "all the clearing, grubbing, grading, tunneling, masonry, culverts, ditches, creek channels and such other work connected therewith and rendered necessary thereby as may be required by the engineer in charge of the work," between certain indicated points, "on the line of the said Western Pacific Railroad in the county of Plumas"; the work was to "be commenced at once and shall be entirely completed so as not to delay track laying," and "within the time herein specified." The specifications of the work were at-

tached to this contract but do not appear in the record. The time fixed for the completion of the work does not appear in the contract but doubtless was stated in the specifications. It appeared that defendants completed the work "to the satisfaction of the engineer" July 5, 1909. The amount then due from the construction company was \$14,384.48. By agreement of the parties all but \$2,697.44 was paid to these workmen, and that sum was by like agreement paid into court subject to its decision in this case, of which plaintiff claimed to be entitled to \$1,441.44. The court found that the agreement referred to above was entered into about December 1, but was not reduced to writing and signed until December 21, 1907; that "defendants, John Wilsen & Company, entered into an agreement among themselves, under and by virtue of which it was mutually agreed, understood and consented to by all the persons comprising the partnership, that in case any member of said gang or association should quit work during the period of such construction and leave and abandon the same prior to the completion thereof, that the said party so quitting and abandoning the work prior to the completion of the contract and leaving the gang or association should receive no profits, but only the ordinary going wages received by men employed in work of like character on said construction; less any amounts which had been advanced to said party so quitting work, for supplies or on account of personal expenses during the time he was actually working with said gang or association"; that "in accordance with said agreement among the said partners, the said Antone Carlson, one of said partners, performed work and labor for sixty-five days and five hours thereon, and left said gang or association, and received wages at the rate of three dollars per day, less his expenses"; that "said John Olsen, also a member of said partnership, worked 231 days only, and on or about the fifteenth day of August, 1908, ceased to work, abandoned said contract and did not again return to said work; that the Utah Construction Company advanced to said John Olsen the sum of \$417.85 and charged the same to the copartnership of John Wilsen & Company, leaving a balance due the said Olsen of \$275.15"; that "defendant John Wilsen worked 448 days, Nels Newman 471 days, C. Heiner 458 days, Chris Nelsen 443 days and

Andrew Foer 362 days," all of whom last named "worked until the completion of the contract."

As conclusion of law the court found that plaintiff was entitled to receive \$275.15, and gave judgment accordingly. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

Plaintiff states in his brief that the principal error complained of is the finding as to the agreement made subsequently to the written agreement, i. e., the finding relating to the agreement among themselves as to how the members of the association were to be treated who quit the work before its completion. The claim is that the evidence does not support this finding.

The contention of appellant is that as a partnership was alleged and shown and no subsequent agreement proven, his rights must be determined by section 2403 of the Civil Code, which reads: "In the absence of any agreement on the subject, the shares of partners in the profit and loss of the business are equal."

There was evidence tending to show that the seven men who entered into the engagement with the Utah Construction Company did so upon an equal footing, each to share equally the profits resulting from the work they undertook to do, nothing having at the start been said as to how a partner would share or be paid in case he quit the job. This question had no practical importance at the beginning, as all were supposed to continue working to the completion of their contract. Later this question became a practical one when Antone Carlson quit work after having worked sixty-five days and there was evidence that it was then agreed among the remaining members, including plaintiff, that should one quit the work he should be paid three dollars per day for his work, and it was the understanding that thenceforward, when one of the number quit work and did not return, he should be paid at the same rate as Carlson was paid and no more. Plaintiff's assignor, Olsen, quit when the work was less than half completed, too sick to work. His illness was of no considerable duration. He was at the camp several times in apparent good health after quitting, but he never thereafter resumed or offered to resume work. His claim now is that he should have

shared in the total earnings of the partnership in the proportion which the number of days he worked bore to the whole number of days' work performed by all of the members. The learned trial judge gave him judgment for his days' work at three dollars per day, less advances made to him. This, we think, was justified by the evidence.

In the agreement entered into with the construction company, where the laborers were described as a partnership under the name of John Wilsen & Co., nothing appeared as to the terms of the partnership. Undoubtedly it was competent to show what the understanding of the members was as to how they were to share the profits, and this understanding was within their own control, and it was not necessary that it should be in writing and could be determined at any time. The evidence as to how Carlson was paid was admitted as tending to show the agreement to have been as claimed by defendants, and as Olsen was then a member of the association, it was admissible for that purpose and tended to corroborate the testimony of defendants that the rule adopted in Carlson's case was made the understanding which was to govern should others quit the work. The section of the code relied upon by appellant does not apply, for it is intended to reach cases in the absence of any agreement relating to the shares of partners in the profit and loss of the business. There was nothing unreasonable or inequitable in the agreement found by the court; on the contrary, it was but just to those who stood by their contract with the construction company to the finish, and took the risks of loss in the business that they alone should share whatever profits might result from their fidelity to their obligations.

There was much evidence that the custom among these "section gangs," as they were called, was in accordance with the agreement found by the court, but on plaintiff's motion all evidence relating to custom was stricken from the record and was not considered. The findings were grounded upon the testimony of the members of the partnership association, other than that of Olsen, and was, we think, as to the rights of any who quit work, ample to support the view taken by the trial court.

Appellant's brief is almost entirely devoted to a discussion of the evidence, as to which the most that may be said in his

favor is, that it is conflicting. It would serve no useful purpose, and would needlessly prolong this opinion to undertake an analysis of the testimony in the case.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 809. Second Appellate District.—May 18, 1910.]

ISIDOR SALMONSON, Appellant, v. L. STREIFFER,
Respondent.

IMPROPER DEFAULT AND JUDGMENT—VACATION—EXCEPTION TO SURETIES ON ATTACHMENT BOND NOT AN APPEARANCE.—Where no summons was served upon the defendant, the mere exception by defendant to sureties on an attachment bond cannot constitute an appearance in the action, or authorize the entry of the default of the defendant, or of a judgment by default against him, and the court properly vacated such default and judgment by default, on motion of the defendant, on the ground that the court never acquired jurisdiction of his person.

ID.—APPEARANCE, HOW CONSTITUTED.—Under section 1014 of the Code of Civil Procedure, "A defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." This statute was intended to settle all disputes as to what constitutes an appearance. There can be no chance for argument about equivocal acts not constituting either of those enumerated.

ID.—EXCEPTION TO SURETIES INVOLVING NO APPEARANCE IN COURT.—In excepting to the sufficiency of sureties on an attachment bond, the defendant is not required to appear in court. The notice of such exception does not contemplate the appearance of the sureties in court for any purpose. It merely contemplates the duty of the plaintiff to justify, not before the court, but before the judge or clerk thereof, and in case of failure so to do, the judge or clerk must issue an order vacating the writ of attachment.

ID.—NOTICE OTHER THAN EXPRESS NOTICE OF APPEARANCE NOT EFFECTIVE AS AN APPEARANCE.—The giving of any mere notice other than the express notice of appearance provided for in section 1014 of the Code of Civil Procedure cannot be effective to constitute a notice of appearance.

APPEAL from an order of the Superior Court of Los Angeles County, vacating a default and a judgment by default. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

Isidore B. Dockweiler, for Appellant.

Goldberg & Meily, for Respondent.

SHAW, J.—Plaintiff appeals from an order of court granting defendant's motion to set aside his default and vacate the judgment rendered thereon against him.

Respondent assigns several grounds upon which he insists the record herein is not entitled to be considered upon this appeal for any purpose. We deem it unnecessary to pass upon this contention, for the reason that, accepting the record at appellant's valuation thereof, it discloses no error in the ruling of the court.

As appears from the transcript the complaint was filed November 9, 1908. No summons was ever served upon defendant. On November 13, 1908, defendant caused to be served upon plaintiff's attorney a notice as follows: "You and each of you will please take notice that the defendant herein hereby excepts to the sufficiency of the sureties upon the undertaking heretofore given by said plaintiff in said action to secure an attachment therein, and demands that said sureties justify as required by law. Goldberg & Meily, Attorneys for Defendant." On December 14th, in the absence of service or filing of any other documents on behalf of defendant, the clerk entered defendant's default, the ground assigned therefor being that defendant had been regularly served with process and had failed to appear and answer plaintiff's complaint. Judgment followed upon the same date. Thereafter, pursuant to notice duly given, defendant made his motion to set aside the default and vacate the judgment upon the ground that the court never obtained jurisdiction of the person of the defendant. This motion was granted.

Appellant contends that excepting to the sufficiency of the sureties upon the undertaking, notice of which was served upon plaintiff, constituted a voluntary appearance in the ac-

tion on the part of defendant. We cannot assent to this proposition.

Section 1014, Code of Civil Procedure, provides: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance or when an attorney gives notice of appearance for him." In *Vrooman v. Li Po Tai*, 113 Cal. 305, [45 Pac. 471], the court, through Mr. Justice Temple, in discussing the effect to be given under this provision to stipulations extending defendant's time to answer, says: "But it is contended by respondent that by taking and filing the stipulation extending the time to answer, and by accepting and acting upon the agreement to grant successive extensions in consideration of certain payments made, defendant appeared in the action. Section 1014 of the Code of Civil Procedure defines what shall constitute an appearance. A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or when an attorney gives notice of an appearance for him, and he can appear in no other way. This statute was intended to settle all disputes upon the subject. There can be no chance for argument about equivocal acts. . . . There was no need of a statute to tell us that the acts specified would constitute appearance. The occasion for a rule was to dispose of questions upon which there might be dispute." There is no ambiguity or uncertainty in the statement made by the learned judge to the effect that the purpose of the rule was to dispose of questions upon which there might be dispute. While the statute requires the notice of appearance by defendant in *proper* to be a written notice, such requirement is not exacted when the notice is given for him by an attorney. In such case, it need not necessarily be in writing. It may be given by the act of appearing in open court upon an application for affirmative relief which could only be granted upon the hypothesis that defendant had submitted himself to the jurisdiction of the court. (*Security etc. Co. v. Boston etc. Co.*, 126 Cal. 418, [58 Pac. 941, 59 Pac. 296].) The mere giving of a notice of a motion to be made at a certain time and place for the dissolution of an attachment issued in the cause would not constitute such an appearance. In *Glidden v. Packard*, 28 Cal. 649, it was expressly held that the notice of a motion to dissolve an attachment did not constitute an appearance

authorizing the entry of defendant's default. If, however, pursuant to such notice, the attorney appears in court and makes the motion, such act on the part of the attorney would be sufficient to constitute notice of appearance. In excepting to the sufficiency of sureties defendant is not required to appear in court. Such notice does not even contemplate his appearance therein for any purpose; neither does it contemplate an application to the court for any relief whatsoever. The giving of it imposes upon the plaintiff the duty of having the sureties, or others in their place, justify, not before the court, but before the judge or clerk thereof, and in case of failure so to do, the judge or clerk must issue an order vacating the writ of attachment. In *Steinback v. Leese*, 27 Cal. 295, the court, in discussing this section of the code, says: "The words 'answer' and 'demurs' are obviously words of enumeration, and we cannot, on received principles, interpolate into the text notices of motion for new trials, notices of appeal, nor any other paper served incidentally in the conduct of judicial proceedings, the direct and principal purpose of which is, not to give notice of appearance, but to give notice of a step taken or about to be taken in the cause."

In our judgment, excepting to the sufficiency of sureties upon an undertaking is in no sense an appearance in the action wherein the attachment is issued. To so hold would not only violate the express provisions of section 539, Code of Civil Procedure, but impose a penalty upon the defendant, whether resident or nonresident, by requiring him to subject himself to the jurisdiction of the court as a condition of exercising the right conferred by statute.

The order appealed from is affirmed.

Allen, P. J., and Taggart, J., concurred.

[Crim. No. 135. Third Appellate District.—May 14, 1910.]

In re Application of CARROLL COOK for Writ of Habeas Corpus, on Behalf of CHARLES MURRAY.

CRIMINAL LAW—ATTEMPT TO ESCAPE FROM STATE PRISON—FELONY—INVALID CHARGE OF ESCAPE.—Conceding that section 105 of the Penal Code, punishing the crime of escape from the state prison by imprisonment therein for a term equal in length to the term the defendant was serving at the time of such escape, to commence from the time he would otherwise have been discharged from said prison, is invalid, as being in conflict with the state and federal constitutions, yet where under such charge the defendant pleads not guilty, and afterward pleads guilty to the distinct charge embodied in section 106 of the Penal Code, making it a felony to attempt to escape from the state prison, the legislature has in effect embodied section 18 of the Penal Code defining the punishment for a felony with section 106 thereof.

ID.—CRIME OF ATTEMPTING TO ESCAPE EMBODIED IN CHARGE OF ESCAPE.

The crime of an attempt to escape is necessarily embodied in the language of the charge of an escape, even though such charge is not valid, since no one can escape from state's prison without attempting to escape therefrom.

ID.—ABSENCE OF DEMURRER.—In the absence of a demurrer to the indictment, whatever defects may characterize the mode of statement of the offense of which the defendant pleaded guilty were waived by the plea, which amounted to an admission that the offense to which he confessed his guilt was within the language of the indictment.

ID.—COURT CLOTHED WITH POWER TO SENTENCE AND PUNISH.—After such plea of guilty of an attempt to escape, the court was clothed with full power and jurisdiction to pronounce and cause to be entered the judgment of punishment for the felony charged.

ID.—WRIT OF HABEAS CORPUS NOT TENABLE.—A writ of *habeas corpus* to test the validity of such additional judgment for felony must be discharged, and the prisoner remanded to the warden of the state prison.

PETITION for discharge on writ of *habeas corpus* from custody of warden of state prison.

The facts are stated in the opinion of the court.

A. S. Newburgh, and Carroll Cook, for Petitioner.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

HART, J.—The contention of the petitioner is that Murray is now restrained of his liberty by the warden of the state prison at Folsom upon a commitment issued under a void judgment; that such restraint is therefore illegal, and that the prisoner is entitled to be released therefrom through the writ of *habeas corpus*.

It appears that, while undergoing a sentence of imprisonment for the term of ten years in the state prison at Folsom, and before the expiration of said term, Murray, on the seventeenth day of May, 1904, escaped from said prison; that, subsequently, he was apprehended, and that thereafter the grand jury of Sacramento county returned to the superior court of said county an indictment purporting to charge him with the crime of escaping from state prison, as defined by section 105 of the Penal Code. Upon his arraignment upon this indictment, Murray entered a plea of not guilty. Subsequently, however—on December 8, 1904—he withdrew said plea to said indictment and entered a plea, under the allegations of the same indictment, of guilty of the crime of attempting to escape. Thereupon the court sentenced the prisoner to a term of three years in the state prison at Folsom, the term of imprisonment therefor to commence “from the time such convict would otherwise have been discharged from said prison.” (Pen. Code, sec. 106.)

If allowed under his first sentence the credits to which, upon certain conditions, he would be entitled under the terms of section 1588 of the Penal Code (Deering’s edition, 1909), Murray would now be entitled to his discharge but for the sentence or judgment of imprisonment pronounced and entered against him on his plea of guilty of the crime of attempting to escape from said prison.

The claim of the petitioner on behalf of the prisoner is that the indictment failed to state a public offense because of the alleged invalidity of section 105 of the Penal Code, under which said indictment was framed, and that, therefore, “all proceedings thereafter had were void as being beyond the jurisdiction of the court.”

The argument upon this point is that if the provisions of section 105 of the Penal Code are in violation of the state and federal constitutions, as is the contention, then the in-

dictment, being based upon said section, necessarily failed to state any offense of whatsoever nature. In other words, the claim is that if the indictment does not charge the crime of "escaping from the state prison," it cannot charge the crime of "attempting to escape from state prison," for, so the argument goes, an attempt to commit an act which, when consummated, is not a crime, cannot itself be a crime.

Section 105 of the Penal Code reads as follows: "Every prisoner confined in the state prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the state prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison."

The indictment challenged here is substantially in the language of the foregoing section, and there is no claim that, if said section is not out of harmony with certain provisions of the state and federal constitutions, the allegations of said indictment do not properly set forth a public offense.

The validity of the section of the code under which the indictment was framed is attacked upon the ground that the punishment therein prescribed is such as that it operates with manifestly unjust and unwarranted inequality upon prisoners adjudged guilty of escaping from prison, and that, consequently, the section is in direct conflict with the terms of the fourteenth amendment of the constitution of the United States, guaranteeing to all the equal protection of the law, and with certain provisions of the state constitution, among which is the provision that all laws of a general nature shall have a uniform operation, etc.

This position, while new in this state, has been sustained in other jurisdictions upon what I conceive to be unanswerable reasoning. (*State v. Lewin*, 53 Kan. 679, [37 Pac. 168]; *In re Mallon*, 16 Idaho, 737, [102 Pac. 374]; *Barbier v. Connolly*, 113 U. S. 27, [5 Sup. Ct. Rep. 357]; *Coon Hing v. Crowley*, 113 U. S. 703, [5 Sup. Ct. Rep. 730]; *Hayes v. Missouri*, 120 U. S. 68, [7 Sup. Ct. Rep. 350].) But, conceding that section 105 of the Penal Code is invalid for the reasons suggested, we are nevertheless of the opinion that the indictment stated the offense defined by section 106 of the Penal Code,

which provides: "Every person confined in the state prison for a term less than for life, who attempts to escape from such prison, is guilty of a felony, and, on conviction thereof, the term of imprisonment therefor shall commence from the time such convict would otherwise have been discharged from said prison."

It is thus to be seen that the legislature, by the terms of the foregoing section, has declared as a distinct offense, entirely apart from and in no manner or degree or to any extent whatsoever dependent for its force or vitality on the provisions of section 105, the act of attempting to escape from such prison. In other words, section 106 receives no vital force from the provisions of section 105. No one will for a moment question or doubt the power and the right of the legislature to denounce the act of attempting to escape from a prison as a crime, regardless of whether it makes the act of actually escaping from such prison a crime. The legislature has declared that any prisoner confined in a state prison for a term less than for life who *attempts* to escape from such prison is guilty of a felony, and if the legislature has for any reason failed to declare it a crime for such prisoner to effect his escape from such prison, this mere omission cannot of itself in any measure or in any sense render the act of attempting to escape any the less a crime. Of course, if the legislature had not made the act of attempting to escape from a state prison itself a specific and distinct crime, then the position of counsel for the prisoner would be unimpeachable, assuming that section 105 is void. But, as seen, the crime of attempting to escape is as distinct from the crime of escaping as grand larceny is from robbery, although, as is true as to the two last-named offenses, the first two necessarily possess, in some respects, the same elements.

It follows from the views thus far ventured that there can be no merit in the suggestion that, if section 105 is void, there can be no penalty imposed in the case of the violation of section 106. The penalty prescribed by the last-mentioned section is entirely different from that which section 105 pretends to authorize. Section 106 declares the act therein described to be a felony, but does not expressly prescribe the penalty for the commission thereof. No difficulty, however, results from this omission, since the Penal Code elsewhere (section

18) provides that "except in cases where a different punishment is prescribed by this code, every offense declared to be a felony is punishable by imprisonment in the state prison not exceeding five years," and thus a penalty for the act denounced by section 106 is as clearly and definitely fixed and prescribed as if the language of section 18 had been expressly referred to by section 106. The legislature, in other words, has itself made section 18 a part of section 106, so far as the penalty is concerned.

The remaining question is, Did the indictment state the crime defined by section 106 of the Penal Code and to which the prisoner entered a plea of guilty?

As before stated, the allegations of the indictment are substantially in the language of section 105 of the Penal Code, and attempted to charge the prisoner with the crime of escaping from a state prison. Necessarily the crime of attempting to escape from the state prison is included within the act of escaping from said prison, for, manifestly, one could not escape without first making the *attempt* to escape, and if, as counsel undertake to maintain, there be no such crime as "escaping from a state prison," the charge that the prisoner attempted to escape is, of necessity, included if not within any crime alleged, within the language by which the alleged crime of "escaping," etc., is set forth in the indictment.

We do not intend to be understood as saying that, if the only offense sought to be charged against the prisoner was that of an attempt to escape from a prison, the indictment would not have been compelled to yield to the claims of a demurrer; but there was no demurrer, and, therefore, whatever defects might characterize the statement of the offense to which the prisoner pleaded guilty were waived by said plea. His plea, in other words, amounted to an admission that the offense of which he thus confessed his guilt was within the language of the indictment. As is said in *In re Myrtle*, 2 Cal. App. 383, [84 Pac. 335], the indictment, taken with the plea of the prisoner, establishes a case of attempt to escape from a prison as completely as if it had in fact been specifically alleged in the indictment that the prisoner had made an attempt to escape. As we have stated, an attempt to escape is necessarily charged by the statement that the prisoner did escape, and thus the court, after the plea of guilty, was clothed with

full power and jurisdiction to pronounce and cause to be entered the judgment upon which the prisoner is suffering the restraint of which he here complains.

We doubt not that the court had jurisdiction to accept the plea of the prisoner and thereupon to pronounce the challenged judgment.

The writ will therefore be discharged and the prisoner remanded to the warden of the state prison.

Burnett, J., and Chipman, P. J., concurred.

[Civ. No. 628. Third Appellate District.—May 14, 1910.]

**NORTHERN LIGHT AND POWER COMPANY, Appellant,
v. HENRY STACHER et al., Defendants; MARTHA
SHERIDAN, J. R. HUNT, and WARREN G. ATKINS,
Respondents.**

EMINENT DOMAIN—ELECTRIC LIGHT AND POWER COMPANIES—NECESSITY FOR TAKING—FUTURE NEEDS OF PUBLIC.—Electric light and power companies, like other public service corporations, have a right, and it is their duty in determining the necessity to condemn the property sought in eminent domain, to anticipate future needs of the public. They cannot reasonably be required to limit their preparations for future demands by their ability to provide for them out of the present supply. New uses for electricity are constantly being discovered and applied. The supply which in the same community would at present be sufficient might be insufficient in a short time.

ID.—PLEADING—EXTENT OF FACILITIES OF PRESENT EQUIPMENT NOT REQUIRED.—Public service corporations cannot state with certainty to what extent their facilities to serve the public will be availed of; nor should they be required to determine in advance and set forth in their complaint that their present equipment is insufficient to meet the needs of the people.

ID.—EVIDENTIARY MATTER.—The requirement that the particular property sought should be available, and that it can be used for the purposes desired, and that it is necessary to meet the public needs, are matters, the particular facts in support of which are evidentiary, rather than subjects of pleading.

ID.—SUFFICIENCY OF COMPLAINT AS TO NECESSITY.—A complaint alleging in substance that a large number of people are without electricity, whose needs in that regard the plaintiff alleges its desire and purpose to supply, and seeking to condemn necessary water power for such use, is sufficient to show the necessity for the taking.

ID.—BURDEN OF PROOF — BURDEN OF PLEADING NOT COMMENSURATE.—The burden of proving the issue of necessity is upon the plaintiff. The evidence upon which he relies in making such proof may or may not be sufficient when subjected to the proper test at the trial. But no burden rests upon him to state all the facts he intends to prove in order that the complaint may stand the test of a demurrer. No evidentiary matter should be stated in the complaint.

ID.—POWER OF ELECTRIC LIGHT AND HEAT COMPANIES TO CONDEMN WATER POWER—CONSTRUCTION OF CODE.—When the right of eminent domain is expressly conferred by section 1238 of the Code of Civil Procedure in behalf of canals, reservoirs, etc., “from sources other than a natural lake,” for “supplying, storing and discharging water for or in connection with the operation of machinery, for the purpose of generating and transmitting electricity,” and section 1240, properly construed, includes riparian rights to water as the subject of condemnation, it appears that water is as essential to the use of canals or reservoirs as is land, and reading sections 1238 and 1240 together, “water may be taken by the right of eminent domain in behalf of canals and reservoirs, in connection with the operation of machinery for the purpose of generating and transmitting electricity.”

ID.—WATER PART OF REAL PROPERTY TO BE CONDEMNED.—Where land is condemned for a reservoir, if there is a water right which is part of the land, it may be condemned with it. Water flowing over land is real property and may be condemned for any public use specified in section 1238 of the Code of Civil Procedure.

ID.—RIPARIAN RIGHTS—CONDEMNATION FOR ELECTRIC POWER.—Riparian rights in a stream of water may be condemned for public use for electric power by electric light and power companies.

ID.—SUFFICIENCY OF COMPLAINT—CERTAINTY OF RIGHTS TO BE CONDEMNED.—Where the complaint definitely describes the land of all of the defendants by legal subdivisions, and alleges that “the waters of Old Cow creek flow over, along and upon said land,” and that “it is necessary that plaintiff shall appropriate, take and use all riparian rights of defendant to and connected with the waters of said Old Cow creek,” and it prays for the condemnation of the riparian rights therein, it shows with reasonable certainty the property sought to be condemned.

ID.—FACTS SHOWING NECESSITY NOT REQUIRED TO BE PLEADED.—Facts showing the necessity for the taking of such rights for public use are not required to be pleaded, but are matter of evidence.

ID.—QUANTITY APPROPRIATED BY PLAINTIFF IMMATERIAL—QUANTITY OF RIPARIAN RIGHTS NEED NOT BE STATED.—Where the complaint sets forth that plaintiff is the owner and appropriator of five thousand inches of the waters of the stream, that fact is immaterial, where the only property sought to be condemned is the riparian rights of the defendants. The quantity of such riparian rights need not be stated; but it is sufficient that the complaint avers the necessity for taking all of the water of the creek, including the riparian rights of the defendants, which is the only matter in issue.

ID.—COMPENSATION TO BE FIXED.—Whatever may be the riparian rights of the defendants, which plaintiff seeks to condemn, it will be for the court or the jury to fix the compensation to be paid to each owner, as the facts proved may warrant.

ID.—PLEADING—PUBLIC USE.—A complaint showing that plaintiff is an electric power and light company, and that it needs the riparian rights of the defendants, sufficiently shows that the use sought is a public use, and that the plaintiff is in charge of a public use.

ID.—PUBLIC USE MUST BE DECLARED BY LAW.—The complaint must show that the use for which the property is to be taken is for a public use, so declared by the legislature. No property can be condemned for a private use, or to accomplish any purpose not of a public character.

ID.—RIPARIAN RIGHTS NOT EXPRESSLY ENUMERATED—NECESSARY IMPLICATION—AUTHORITATIVE CONSTRUCTION.—The mere fact that riparian rights are not expressly enumerated as the subject of condemnation is not conclusive, where their condemnation is necessarily implied in the language of subdivisions 12 and 13 of section 1238 of the Code of Civil Procedure, construed with section 1240 thereof, which includes "all real property" and "all classes of private property not enumerated," with no express exception of riparian rights; and where it is settled by authoritative construction that riparian rights are the proper subject of condemnation to public use.

ID.—COMPLAINT SHOWING CAUSE OF ACTION — DEMURRER IMPROPERLY SUSTAINED — REVERSAL.—Where the complaint stated a sufficient cause of action for the condemnation of riparian rights for the public use of an electric light and power company, a demurrer thereto was improperly sustained and the judgment sustaining it must be reversed, with direction to overrule the demurrer.

APPEAL from a judgment of the Superior Court of Shasta County. Charles M. Head, Judge.

The facts are stated in the opinion of the court.

Geo. O. Perry, Perry & Kerrigan, and Guy C. Earl, *Amicus Curiae*, for Appellant.

Francis Carr, for J. R. Hunt, and Warren G. Atkins, Respondents.

Herzinger & Herzinger, for Martha Sheridan, Respondent.

Reid & Dozier, *Amici Curiae*, for Respondents.

OPINION ON REHEARING.

CHIPMAN, P. J.—We still adhere to the conclusions reached in the former opinion for the reasons there given.

We invited further consideration of two questions—first, Does the complaint state sufficient facts upon the issue of the necessity for the taking? and, second, Does the statute authorize the taking of water for electric power, light and heat purposes?

In addition to what is said in the former opinion, it may not be amiss to make some further observations upon these two questions.

First, as to the question of necessity. Section 1241, Code of Civil Procedure, provides, as we have seen, that—"Before any property can be taken, it must appear: 1. That the use to which it is to be applied is authorized by law; 2. That the taking is necessary to such use." The point urged is that the complaint does not allege facts sufficient to present the issue of necessity; that the averments do not meet the requirements of the law without showing: 1. That the wants and needs of the people require the production and supply of electricity in excess of the present supply; 2. That the present equipment controlled by appellant is insufficient to meet such needs; 3. That the particular property sought is available and can be and will be used for the public purposes mentioned and that it is necessary to take the property to meet the public needs.

It is alleged that a large number of people are without electricity whose needs in that regard appellant alleges its desire and purpose to supply, and to this end that it is necessary to condemn the property sought. Electric light and power companies, like other public service corporations, have a right and it is their duty to anticipate future needs of the public. They cannot reasonably be required to limit their preparations for future demands by their ability to provide

for them out of their present supply. New uses for electricity are constantly being discovered and applied. The supply which in the same community would at present be sufficient might be insufficient in a short time. Nor can public service corporations state with certainty to what extent their facilities to serve the public will be availed of. Neither can they determine, nor should they be required to determine in advance, and set forth in their complaint that their present equipment is insufficient to meet the needs of the people. It is, of course, required that the particular property sought be available and can be used for the purposes desired and also that it is necessary to meet the public needs. But these are matters the particular facts in support of which are evidentiary rather than subjects of pleading. In *Spring Valley W. W. v. Drinkhouse*, 92 Cal. 532, [28 Pac. 681], and in *Central Pacific R. R. Co. v. Feldman*, 152 Cal. 309, [92 Pac. 849], cited by respondent, it was the evidence necessary that was being considered and not the pleadings. The complaint is set out quite fully in the original opinion and its averments need not be here repeated. They seem to us sufficient to present the issue of necessity for the taking. The burden of establishing this issue is upon plaintiff, and it was not required of plaintiff to set forth in its complaint the evidence on which it relies to prove the alleged necessity. This evidence may or may not be found sufficient when subjected to proper test at the trial, but we do not think that the burden is upon plaintiff to present all the facts in its complaint in order that this test may be fully and properly determined on demurrer.

The more serious question urged is, Does the statute authorize the condemnation of property by electric power, light and heat companies, under any condition of facts? Respondent denies to such corporations such power. The claim is that while they may condemn property for "canals, reservoirs, dams, ditches, flumes, aqueducts and pipes and outlets, for storing and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines (and for many other specified purposes) with electric power," as set forth in subdivisions 12 and 13, section 1238, Code of Civil Procedure, they cannot condemn water, without which the canals, reservoirs, etc., would be useless, but must acquire the water by appro-

priation or purchase; that they may condemn the *means* whereby water may be used but not the *water itself*. This denial, of course, extends to all persons or corporations, municipal or otherwise, to acquire water in any other method than by appropriation or purchase for such purposes, however imperative the need of the public. In our former opinion we endeavored to show that water is property and may be taken like other property. It is conceded now that water is property and may be taken for purposes authorized by law, but the claim is that it is not so authorized in terms or by implication in subdivisions 12 and 13 above referred to; that in neither one of these subdivisions is water expressly mentioned "for power purposes or for generating electricity as one of the uses of the power company for which condemnation may be made."

Section 1238 provides that, "subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following uses." Then follows an enumeration of the uses, among them the uses mentioned in subdivisions 12 and 13. The property which may be taken is classified and enumerated in section 1240, and, as we have held, includes water and riparian rights to water. Section 1238 declares: "The right of eminent domain may be exercised *in behalf* of the following uses," and among them are canals, reservoirs, etc., "from sources other than a navigable lake," for "supplying, storing and discharging water for or in connection with the operation of machinery, for the purposes of generating and transmitting electricity," etc. If water may be taken and canals, reservoirs, etc., may be taken for supplying, storing and discharging water, it seems to us that water may be taken to be used in canals, ditches, pipes, etc., or stored in reservoirs for the uses enumerated. The limitation upon the taking of water is found in section 1238 and the taking must be for one of the uses authorized by that section; and if water is sought under eminent domain the power may "be exercised *in behalf* of the" uses enumerated. When the statute says that land may be condemned (section 1240), the right to take it for canals, reservoirs, etc., i. e., "in behalf of the following uses," is found in section 1238. Water is as necessary for the uses and purposes mentioned in subdivisions 12 and 13 as is land. And land is therein

mentioned only in connection with the site on which to erect the machinery to generate electricity. When the statute declares canals, reservoirs, etc., to be public uses, it does not mean completed or already constructed canals, reservoirs, flumes, pipes, etc.; it means the right to take land to be used for the purpose of constructing these agencies or instrumentalities "for supplying, storing and discharging water" for the purposes named. Respondents' contention, carried to its logical conclusion, would deprive the corporation of the right to condemn land for canals, reservoirs, ditches, etc., because land is not expressly mentioned, and would confine the right to condemn only completed canals, reservoirs, etc. Obviously this cannot be the true construction to be given the statute. Yet water is as essential to the use of canals, reservoirs, etc., as is land; each is useless without the other. Reading sections 1238 and 1240 together, they mean to say this: "Water may be taken by the right of eminent domain in behalf of the following public uses, namely, canals, reservoirs, etc., in connection with the operation of machinery, for the purpose of generating and transmitting electricity."

The case is quite supposable where certain land is susceptible of being utilized as a reservoir, and may be indispensable to the success of plans for furnishing power with which to generate electricity for the purposes mentioned in the statute. The owner of this land may have it in a high state of cultivation under irrigation from a stream of water flowing through it which he has appropriated for such use. To convert this land into a reservoir must necessarily deprive the owner of both land and water and in assessing the damage, in taking the land, the damage would be enhanced by the water appropriated with it. In such case the water is appurtenant to the land and would be taken with it. The statute gives the right to take the land for a reservoir and this right would not be affected because it also involved the taking of water with it.

Somewhat similar provision is made by subdivision 3 of section 1238, for the exercise of eminent domain "in behalf of . . . ponds, lakes, canals, aqueducts, reservoirs . . . for conducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village or town." Respondents' contention would prohibit the taking

of water "in behalf of" these objects, which it seems to us would be no less violative of the intention of the statute than that sought to be given subdivisions 12 and 13.

In *St. Helena Water Co. v. Forbes*, 62 Cal. 182, [45 Am. Rep. 659], where sections 1238 and 1240 were under review, and where it was held that water might be taken for the purpose of supplying the inhabitants of a town, Mr. Justice Myrick very clearly elucidated the question. He said: "The land through, over, and upon which pipes, aqueducts, flumes and ditches may be constructed or laid is not used by the public; the corporation uses the land for the conveying of water; the water, after having been conveyed, is taken by the public, and at that point, strictly speaking, is where the public use commences; but both the water and the land are taken, to the end that the public may be supplied with the one by the use of the other. In this case the plaintiff has already acquired the one, viz., places for its pipes, etc. (which are worthless and serve no purpose without water), and now seeks to acquire the necessary water, such water, when acquired, to be used in behalf of, for the benefit of, to the interest of, for the behoof of, ditches, etc., for conducting water for the use of the inhabitants of a village. (See Worcester's Dictionary, 'Behalf.')" In the same case Mr. Justice Ross said: "There can be no sort of doubt that the supplying of the inhabitants of a town with pure fresh water, is one of the 'public uses' in behalf of which the legislature has declared the right of eminent domain may be exercised. (Code Civ. Proc., sec. 1238.)" Following this declaration that the supplying of water to the inhabitants of a town is a public use (subd. 3 of sec. 1238, Code Civ. Proc.), the court further says: "It is equally clear that the plaintiff is authorized to exercise the right of eminent domain *in behalf of* such use. Section 1001 of the Civil Code provides: 'Any person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, either by consent of the owner or by proceedings had under the provisions of title VII, part III, of the Code of Civil Procedure (relating to eminent domain); and any person seeking to acquire property for any of the uses mentioned in such title is an agent of the state, or a person in charge of such use, within the meaning of those terms, as

used in such title.' ” The opinion then proceeds to show that water, which was the property in question, “comes within the category of real property.”

In *Pasadena v. Stimson*, 91 Cal. 238, [27 Pac. 604], it was held, under section 1001 of the Civil Code, that private property might be taken for any use specified in section 1238, Code of Civil Procedure. So held in *Santa Cruz v. Enright*, 95 Cal. 105, [30 Pac. 197], both of which cases are referred to approvingly in *City of Los Angeles v. Leavis*, 119 Cal. 164, [51 Pac. 34]. We confess our inability to escape the simple logic of these cases, which is, when reduced to the simplest statement, that water is property and may be taken “in behalf of” any of the uses specified in section 1238, Code of Civil Procedure; and that the objects and purposes of plaintiff constitute a public use under that section. (See *Shasta Power Co. v. Walker*, 149 Fed. 568; later, after trial, as reported in 160 Fed. 856, 87 C. C. A. 660; paragraphs quoted in our first opinion.)

The judgment is reversed, with directions to overrule the demurrer.

Burnett, J., and Hart, J., concurred.

The following is the opinion of the district court of appeal, rendered on the 17th of December, 1909, which is approved in the foregoing opinion on rehearing:

CHIPMAN, P. J.—This is an action to condemn certain riparian rights. A general and special demurrer to the third amended complaint was interposed by certain defendants and sustained by the court without leave to amend. Plaintiff appeals from the judgment. There are twenty-five separate causes of action involving the rights of as many different and separate riparian owners. Three appeared and had judgment, who will hereinafter be referred to as defendants. Each separate cause of action is couched in substantially the same language and the attack upon one may be treated as an attack upon the other two.

From the complaint it appears that plaintiff was incorporated under the laws of this state in January, 1907, “for the term and duration of fifty years from the date of its incorporation, and is now in charge of the public use hereinafter

mentioned, for which the property hereinafter described is sought to be taken." Defendants contend that the complaint fails to state facts showing that the use is a public use or that plaintiff is in charge of a public use or that the taking of the property is necessary to such use; also, that the allegation of the complaint that plaintiff is the owner of the property sought to be condemned is fatal to the pleading. The special demurrer is upon the grounds of uncertainty and ambiguity, in this, that the complaint "does not distinctly state the use or purpose to which plaintiff . . . seeks to apply the property," or "describe with sufficient certainty the property"; and does not "state the or any reasons or facts showing the necessity for taking the property." Furthermore, that it appears from the complaint that plaintiff owns five thousand inches of the waters of said Old Cow creek, but it "does not definitely appear that there is any other or greater amount of water in said stream to be condemned," or "what amount or right, if any, to said stream the defendants hold or own which the plaintiff seeks to condemn." It becomes necessary to present somewhat fully the averments of the complaint:

"II.

"That plaintiff is incorporated for the purpose, among other things, to generate, make and produce by water power, and to transmit and distribute for sale to and by the public generally in the county of Shasta, and elsewhere in the state of California, electric current (which words are used herein to designate all kinds and forms of electricity and electric energy) for light, power and heat, and for other and all purposes and objects for which said current can now or may hereafter be used and applied by the public, and to acquire all kinds of property and do every act necessary or convenient to generate, make, produce, transmit and distribute said electric current, and generally for the supplying and storing water for the operation of machinery for the purpose of generating and transmitting such electric current and electricity for the supplying of mines, quarries, railroads, tramways, mills, and factories with electric power, and also for the supplying electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages and towns; and said plaintiff owns and is now in possession, use and

enjoyment of a certain franchise granted by the county of Shasta, by ordinance of the board of supervisors thereof, for the erection of poles and the stringing of wires thereon during the period of plaintiff's corporate existence as hereinbefore set forth, for the transmission of electricity over, along and upon the public roads and highways of said county of Shasta, and over, along and upon the streets, avenues and alleys of the unincorporated towns of said county of Shasta, for the supplying of inhabitants of the said county of Shasta with such electricity for light, power and heat; and also owns and is in possession, use and enjoyment of a certain franchise granted by the city of Redding, the only incorporated city in said county of Shasta, by ordinance of the board of trustees thereof, for the erection of poles and the stringing of wires thereon, for the transmission of electricity over, along and upon the public streets, avenues and alleys of said city of Redding, for the supplying of inhabitants of said city with such electricity for light, power and heat.

"III.

"That plaintiff is by virtue of a location and appropriation made the — day of September, 1904, and duly sold, assigned, transferred and conveyed to this plaintiff thereafter and prior to the commencement of this action, the owner of and entitled to take, use and divert five thousand inches of the waters running and flowing in that certain creek in the eastern portion of said county of Shasta, commonly known and designated as Old Cow creek, at a point in section 32, township 33 north, range 1 east, M. D. M., to be conveyed by means of ditches, flumes, aqueducts and natural water ways from the said point of diversion to a point in section 6, township 31 north, range 1 west, M. D. M., where the same is to be used for the purpose of generating electricity as above set forth and is then to be permitted to return to and flow down a certain branch of said Old Cow creek known as South Cow creek, down which branch known as South Cow creek said water will flow and return to and mingle with the waters flowing down Old Cow creek, its natural channel as aforesaid.

"IV.

"That said Old Cow creek is not a navigable stream or watercourse. . . .

"The said Old Cow creek flows and runs over five thousand inches of water, and said plaintiff is, as aforesaid, the owner of five thousand inches of water running and flowing therein, by virtue of appropriation as aforesaid, and entitled to take, divert and use the same as against the said defendants, and as against all the world except as to riparian rights of said defendants therein, which said riparian rights are, as herein set forth, sought to be condemned in this action.

"V.

"That the name of the sole owner and claimant of the only person in the use, occupation and possession of or having any interest in the property described in this first cause of action in this complaint, or any damages for the taking thereof, so far as is known to or can be ascertained by this plaintiff, is as follows, to wit:

"Martha A. Sheridan is the owner and is in possession of a certain tract of land situated in said county of Shasta, over, along and upon which said waters of said Old Cow creek flow and which is wholly below the point of diversion and between said point and the junction of said Old Cow creek and said South Cow creek as above described, which tract of land is particularly described as follows, to wit: The east half of the southeast quarter of section 6, township 32 north, range 1 east, M. D. M., together with the riparian rights connected therewith and appurtenant thereto, in and to the waters of said Old Cow creek, . . . (particularly describing the nature of said riparian rights).

"That not exceeding two acres of the said lands above described are capable of being irrigated and the total amount of water required to irrigate such land does not exceed one-half of one miners' inch, measured under a four-inch pressure, as aforesaid.

"VI.

"That for the purpose of the construction, operation, use, accommodation and maintenance of plaintiff's proposed canals, flumes, ditches, aqueducts, pipe-lines, electric power lines and

generally for the supplying according to the intent and purposes of its incorporation, said electricity and electric current for the public uses aforesaid, it is necessary that plaintiff appropriate, take, use, acquire, and hold all of said five thousand inches of the running and flowing waters of said Old Cow creek passing through, over, upon and along the several tracts of land herein particularly described, and all riparian rights appurtenant to and connected with said tract of land hereinbefore described in and to said waters of said Old Cow creek.

“VII.

“That the use to which said waters are to be taken and applied by said plaintiff as aforesaid is a public use and that plaintiff is in charge of such public use, and that the taking and acquiring of said waters and said riparian rights as aforesaid is necessary to said use, in that it is necessary that plaintiff shall take said waters as aforesaid as against said defendants and as against said tracts of land, and use and hold the same for the use and purposes herein mentioned and deprive the owners as aforesaid of the riparian rights hereinbefore mentioned and described, and divert, take, use and hold the waters of said creek to the extent of plaintiff's claim thereto as aforesaid, as against the riparian rights of said defendants, at and from the point hereinbefore mentioned as the point of diversion to the point where the said waters are to be used and returned to the natural channel of said Old Cow creek as aforesaid, and by the means hereinbefore mentioned.

“That a large number of the inhabitants of said county of Shasta, and of the public generally in said county of Shasta, and elsewhere in the state of California, are without electricity or electric current for such purposes of light, power and heat or for any other purpose, and it is necessary that plaintiff should take said waters and said riparian rights for the purpose of supplying said use.

“VIII.

“That plaintiff has acquired for said public use from the owners of said lands bordering on Old Cow creek or through which said creek flows between said intended point of diversion and said point where the waters are to be returned to

the natural channel of Old Cow creek, all riparian rights in and to the waters running therein through and over said lands save and except from the above-named defendants in this action, the property hereby sought to be condemned."

We think the purpose for which the property is sought to be condemned appears with sufficient certainty. The land of defendants is definitely described by legal subdivisions and it is alleged that the waters of Old Cow creek flow "over, along and upon" said land, "which is wholly below the point of diversion and between said point and the junction of said Old Cow creek and said South Cow creek as above described." The complaint also alleges that it is necessary that plaintiff appropriate, take and use "all riparian rights of defendants to and connected with said tract of land hereinbefore described in and to said waters of said Old Cow creek." The prayer is for the condemnation of the riparian rights of defendants. The complaint also sets forth specifically the nature and character of the riparian rights connected with said land. This we think sufficient to show with reasonable certainty the property sought to be condemned.

The point made that the facts should be stated showing the necessity for taking the property was made in *Rialto Irr. District v. Brandon*, 103 Cal. 384, [37 Pac. 484], and it was there held that the rule contended for is not a rule of pleading but of evidence.

It is stated in the complaint that there is water flowing down Old Cow creek in addition to the five thousand inches appropriated and owned by plaintiff. The precise quantity flowing through defendants' land is not stated and need not be. It does appear that more water passes down the creek than has been appropriated by plaintiff, and that the various defendants have certain riparian rights to all of it, and plaintiff avers a necessity for taking all the water of the creek, including that to which the defendants are entitled as riparian owners. Plaintiff was not called upon to make an apportionment in its complaint of those riparian rights among their several owners. Whatever those rights may be, plaintiff seeks to condemn all of them, and it will be for the court or a jury to fix the compensation to be paid to each owner as the facts may warrant.

The case of *Shasta Power Co. v. Walker*, 149 Fed. 568, was an action to condemn lands. In many of its features the case was not unlike the one here—the purpose of plaintiff being the same as here and stated in much the same form of pleading. The question whether the use was a public use came up on demurrer. The court said: “Taking the allegations of the complaint as a whole into consideration, and being mindful that the plaintiff has acquired franchises from the city of Redding and the county of Shasta for the purpose of serving the inhabitants of both such municipalities with light, heat and power, I am of the opinion that the plaintiff is shown to be a public service corporation, and hence that the complaint is within itself sufficient. The objection that the contemplated use is vague, indefinite and uncertain cannot be maintained.” The case was later tried on its merits and plaintiff had judgment, and is reported in 160 Fed. 858, 87 C. C. A. 660. In the discussion of what is necessary to constitute a public use and speaking with reference to subdivision 12 of section 1238, Code of Civil Procedure, *supra*, the court said:

“There can be no doubt that within this provision the furnishing of electricity as it is proposed to be furnished by the defendant in error is a use for which the legislature intended that the right of eminent domain might be exercised. The purpose of the statute is to remove obstacles in the way of development and progress in the state, and it is in harmony with the constitution and section 1001 of the Civil Code, which gives to any person without further legislative action the power to acquire property for any of the uses specified in section 1238, ‘either by the consent of the owner or by proceedings had under the provisions of title 7, part 3, of the Code of Civil Procedure, and any person seeking to acquire property for any of the uses mentioned in said title is an agent of the state or person in charge of such use within the meaning of these terms as used in said title.’ . . .

“And it has generally been held by the courts that the generation of electric power for distribution and sale to the public on equal terms is a public enterprise, and that water used for that purpose is devoted to a public use.” (Citing cases.)

It is no longer a disputed proposition that the state through its legislature, in the exercise of its police power, may regulate the rate to be charged by corporations doing a business affected with a public interest. Says Mr. Thompson: "Property is clothed with a public interest within the meaning of this rule when it is used in a manner to make it of public consequence, and its use affects the community at large." (3 Thompson on Corporations, sec. 2950.)

In support of the general demurrer it is urged that plaintiff has stated itself out of court by averring ownership of the property sought to be condemned; citing *City of San Jose v. Freyschlag*, 56 Cal. 8. Plaintiff does not allege ownership of any interest in the riparian rights of defendants. It is alleged that the creek flows five thousand miner's inches and over; that plaintiff is the owner of five thousand inches flowing in the creek and the right to divert the same "except as to the riparian rights of said defendants therein, which said riparian rights are, as set forth herein, sought to be condemned in this action." It appears from the complaint that defendants have a certain interest in the waters to be condemned—namely, riparian rights therein—and these are the rights put in issue.

We think the complaint states facts sufficient to show that the use is a public use and that plaintiff is in charge of a public use. It is true, as claimed by defendants, that the complaint must show that the use for which the property is to be taken is a public use so declared to be by the legislature. It is also true that the courts will not condemn property for a use "which is evidently private or to accomplish some purpose which is not of a public character."

The right of the people or government to take private property for public use is given by section 1237, Code of Civil Procedure, and may be exercised in the manner provided in the subsequent sections—part 3, title VII, of the same code. Section 1238 sets forth the public uses in behalf of which this right may be exercised, "subject to the provisions of this title." Among those public uses are found in subdivisions 12 and 13 the following:

"12. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes and outlets natural or otherwise for supplying, storing and discharging water for the operation of machinery for

the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with lands, buildings and all other improvements in or upon which to erect, install, place, or use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

“13. Electric-power lines, electric-heat lines; and electric light, heat and power lines.”

Section 1239 divides the estates and rights in lands subject to be taken for public use into three classes: 1. A fee simple when taken for certain purposes not here involved. “2. An easement, when taken for any other purpose.” 3. The right to occupy land to remove therefrom such earth, etc., as may be necessary for some public purpose.

Section 1240 classifies and enumerates the private property which may be taken under this title: “1. All real property belonging to any person. . . . 6. All classes of private property not enumerated may be taken for public use when authorized by law.” And section 1241 provides that “Before any property can be taken, it must appear: 1. That the use to which it is to be applied is authorized by law; 2. That the taking is necessary to such use.”

The act of March 22, 1905, [Stats. 1905, p. 777], provides for the sale of franchises by counties and municipalities, among others, “to erect poles or wires for transmitting electric heat and power over or upon any public street or highway,” and provides for the payment of two per cent of the gross annual receipts for the enjoyment of such franchise. Section 629 et seq. of the Civil Code are regulatory, to some extent, of corporations engaged in supplying electricity. The statute relating to eminent domain, however, seems to clearly recognize the object in which plaintiff is engaged and for which it was incorporated as a public use.

The proposition principally discussed and upon which defendants mainly rely is as follows: “The statute does not authorize the condemnation of water or riparian rights for

creating power, for generating electricity, for power lines, heat lines, or electric heat, light or power." The contention is that section 1240, Code of Civil Procedure, "fails to provide expressly for the condemnation of water or the riparian right of the land owners to the flow of water over their lands, thereby leaving a doubt as to the intention of the legislature as to what property should be condemned," and there being a doubt it must be resolved against the right to condemn. Attention is invited to subdivision 7 of section 1240 as showing that the "classes of property not enumerated" may be taken only "when such taking is authorized by law." But this latter clause adds nothing to the statute, for section 1241 provides that "before property can be taken, it must appear that the use to which it is to be applied is a use authorized by law." This condition applies to all the classes of property enumerated in section 1240. The question, then, is, Is water or the riparian right to water property and does it come within any of the classes enumerated as the subject of condemnation? The word "property" includes property real and personal. (Civ. Code, sec. 14.) Anything of which there may be ownership is called property. (Civ. Code, sec. 654.) Clearly, water and the right to its use as riparian to land is property. If it is to be regarded as real property it falls within subdivision 1 of section 1240, and if it is to be regarded as property other than such as is enumerated in the eight other classes, it falls within subdivision 7.

The supreme court said, in *Hill v. Newman*, 5 Cal. 445, [63 Am. Dec. 140]: "The right to water must be treated in this state as it always has been treated, as running with the land, and as a corporeal privilege bestowed upon the occupier or proprietor of the soil; and as such has none of the characteristics of mere personalty." In *Lux v. Haggin*, 69 Cal. 392, [10 Pac. 754], the court said: "The right to running water is defined to be a corporeal right or hereditament, which follows or is embraced by the ownership of the soil over which it naturally passes." (Citing cases.) It would seem to be too plain for argument that if land may be condemned its incidents may also be taken; and whatever doubt there may be of the intention of the legislature in using the term land, such doubt is cleared away by the declaration that "all classes of private property not enumerated may be taken for public

use when authorized by law." These provisions would seem to invite but a single further inquiry, Is the taking authorized by law? The answer here is equally clear and free from doubt and is given in section 1238, which authorizes the exercise of the right of eminent domain in behalf of the uses mentioned in subdivisions 12 and 13 of that section. We have, then, the clearly expressed authority to take property for the use in question, and we also have a clearly expressed description of the property which may be taken. The fact that the statute does not specifically mention water and riparian rights to water suggests no doubt to our minds as to the intention of the legislature.

Mr. Lewis says: "Land and all estates, rights, interests and easements in, or appurtenant thereto, may be taken under the power of eminent domain. There may be a question whether the taking of a particular property, right or easement has been authorized, but if the intention of the legislature is clear, its power is beyond question. The right of a corporation to maintain one or more bridges across a street may be condemned. The rights of riparian and abutting owners may be condemned without taking any estate in the land to which they pertain." (1 Lewis on Eminent Domain, sec. 262a.) The same author says: "All kinds of property, and every variety and degree of interest in property, may be taken under the power of eminent domain." (Lewis on Eminent Domain, sec. 262.) We cannot doubt that the legislature meant, by subdivision 7, section 1240, to include every class of private property not specifically enumerated and that the language is not to be interpreted as excluding water and riparian rights simply because they are not distinctly mentioned. Defendants would have the court ingraft upon the statute an exception so that it would read, "all classes of private property not enumerated *except water and riparian rights* may be taken for public use." This the court cannot do. There is no element of sacredness peculiar to water that should exempt it from bearing the burden placed upon other property when necessary to be taken for the public good.

In the case of *St. Helena Water Co. v. Forbes*, 62 Cal. 182, [45 Am. Rep. 659], the proceeding was "to condemn the waters of the creek (York creek) for the purpose of supplying the inhabitants of the town with water," and the court stated

the principal question to be "whether or not, under the laws of this state, the right of a private individual to enjoy the flow of water in its natural channel, upon or along his land, can be taken from him for such purpose." Sections 1239 and 1240 were under review, and the court decided that the right claimed by defendant could be condemned.

The court, in *Alto Land etc. Co. v. Hancock*, 85 Cal. 219, [20 Am. St. Rep. 217, 24 Pac. 645], referred to the riparian right of Hancock (to the extent that it existed) "as an appurtenance to the land, running with it as a corporeal hereditament. It was one which might be segregated by grant or condemnation, or extinguished by prescription." While the question was not directly involved, the opinion is not without value. In *Gould v. Stafford*, 91 Cal. 146, 155, [27 Pac. 543, 546], the court said: "The right of a riparian proprietor to the flow of a stream of water over his land is an incident of his property in the land, is annexed to the land, and considered part and parcel of it (citing *St. Helena Water Co. v. Forbes*, [62 Cal. 182, 45 Am. Rep. 659]), but may be 'segregated' from the land by grant, condemnation, or by prescription," and, resulting from this doctrine, it was held that the grantors of plaintiff might grant their riparian rights, and hence a subsequent deed of the land would not convey riparian rights.

In *Lux v. Haggin*, 69 Cal. 300, [10 Pac. 697], the court stated that in *St. Helena Water Co. v. Forbes*, [62 Cal. 182, 45 Am. Rep. 659], "the main question was whether the code provides for a condemnation of that species of property (riparian right) to public uses. The question was answered in the affirmative."

City of Santa Cruz v. Enright, 95 Cal. 105, [30 Pac. 197], was an action to condemn the right to the waters of a certain creek. Enright claimed that there was neither authority nor necessity for the exercise of the power, but if there was such power he was entitled to compensation not only as a riparian proprietor but as an appropriator. The distinct question now here was not before the court, but the waters of the creek were condemned and the judgment was affirmed.

Hercules Water Co. v. Fernandez, 5 Cal. App. 726, [91 Pac. 401], was an action to condemn riparian rights. The judgment of condemnation was reversed, but the right to con-

demn was not questioned. In both the cases last above cited eminent counsel appeared, and it is not probable that both they and the court would have failed to observe so vital a matter as is now being urged had the point been deemed to possess merit.

Subdivision 6, section 1240, of our Code of Civil Procedure, is the same as subdivision 6 of section 5958, Revised Codes of North Dakota. In the case of *Bigelow v. Draper*, 6 N. D. 152, [69 N. W. 570], it was held that riparian rights of a land owner may be condemned. (Citing *St. Helena Water Co. v. Forbes*, 62 Cal. 182, [45 Am. Rep. 659], and other cases.) There a railroad corporation condemned the right to a strip of land across the bend of a creek by which to divert the water of the creek and to extinguish the riparian rights to the stream in the bend of the creek thus cut off. The court said, among other things: "It was not necessary to condemn the land through which flows the river to be diverted from its channel. There appears to be no necessity for the taking of the real estate itself; and it is a familiar principle of law that the wresting of private property from the hands of the owners for a public use should never be permitted to extend beyond such property or such interest in property as is reasonably required to subserve the interests of the public." The principle was followed in *State v. Superior Court*, 48 Wash. 277, [125 Am. St. Rep. 927, 93 Pac. 423, 17 L. R. A., N. S., 1005], the court saying: "If riparian rights, right of access, right of light and air, and other kindred, intangible rights appurtenant to real estate, are property, they are certainly such property, and such an interest in real estate, as an owner would be entitled to alienate, thereby conveying an easement. If such rights may be conveyed, we see no reason why they may not, under the right of eminent domain, be condemned when necessary for public use, without an appropriation of the land itself." It was also held in *Clear Creek Water Co. v. Gladeville Imp. Co.*, 107 Va. 278, [58 S. E. 586], that riparian rights could be condemned. Also in *Watauga Water Co. v. Scott*, 111 Tenn. 321, [76 S. W. 888], although in that case the law failed to provide for compensation and the power was for that reason alone held not to have been given. In *Crawford v. Hathaway*,

67 Neb. 325, [108 Am. St. Rep. 647, 6 L. R. A. 889, 93 N. W. 781], the court decided that riparian rights could be condemned under a statute authorizing condemnation of real property. The court said: "The right of riparian proprietors to the use of the waters flowing in the streams to which their lands are adjacent, when once attached, is in its nature a vested right in property, a corporeal hereditament, being a part and parcel of the riparian land which is annexed to the soil, and the use of it is an incident thereto, of which the owner cannot be rightfully divested except by grant, prescription or condemnation. . . . This property right like any other part of his realty is subject to condemnation and appropriation for public use in the manner provided by law." In *McGhee Irr. Ditch Co. v. Hudson*, 85 Tex. 587, [22 S. W. 398], it was held that a statute authorizing condemnation of land carried with it the authority to condemn riparian rights. These cases appear to treat such rights as land or as embraced within the term land, as was the basis of the decision in *St. Helena Water Co. v. Forbes*, 62 Cal. 182, [45 Am. Rep. 659]. We do not feel justified in attempting to test the question by a comparison of the advantages and value of irrigation with the benefits to the public that may be derived from the exercise of the power here invoked. Considerations looking to the value or necessity of the property to the private owner must give way to the requirements of the public at large, for the theory upon which all property is held and enjoyed is that whenever the state needs it as necessary to the welfare of the people thereof it has the right to so declare by law and to take it in accordance therewith, the assumption being that the private owner is compensated in damages and in sharing with other citizens the benefits of the use to which his property is dedicated. And should this in a given case seem inadequate, there is the still further consideration that the rights of the public are paramount to those of the individual, and the welfare of society may rightfully demand unrequited sacrifices of its individual members.

It seems to us that the right to condemn water and the riparian rights thereto, as a public use, is too well grounded in this state, under the law as it now exists, to justify us in setting it aside upon some new view that may now be urged.

The judgment is reversed, with directions to overrule the demurrer.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 13, 1910.

[Crim. No. 241. First Appellate District.—May 16, 1910.]

THE PEOPLE, Respondent, v. ALPHONSE BORDET,
Appellant.

CRIMINAL LAW—PLACING WIFE IN HOUSE OF PROSTITUTION—CONVICTION—INSUFFICIENT BRIEF UPON APPEAL.—Where, upon appeal from a judgment of conviction of a charge that defendant placed his wife in a specified house of prostitution and permitted her to remain there, appellant in his brief merely states that defendant was convicted on the uncorroborated testimony of his wife, which was contradicted in every particular, and "it then became a question of veracity for the jury to determine," and then merely states that "the evidence presented by the people was insufficient to justify the verdict," without pointing out in any way, nor at all, as to what the evidence was or the respects wherein it was insufficient, it is not the duty of this court to consider the sufficiency of the evidence, but it will regard it as sufficient.

Id.—EVIDENCE OF WIFE—OBJECTION TO QUESTION SUSTAINED OVERCOME BY SUBSEQUENT ANSWER.—Where the wife testified that her husband went with her first to a neighboring house, the woman in which went with them to the house of prostitution, an objection sustained to a question as to what conversation took place in the first house was overcome by subsequent answer, that she had no conversation with any person at that first house.

Id.—EXAMINATION OF DEFENDANT—LEAVING CHILDREN IN CARE OF SOCIETY—STATEMENT REGARDING WIFE—PROPER EXCLUSION.—Where, upon defendant's examination after testifying that he placed his children in care of the Society for the Prevention of Cruelty to Children, a question as to what statement he then made to them respecting his wife was properly excluded, where nothing appeared to show its materiality; and any self-serving declaration made by him at that time to third parties would not be admissible.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George H. Cabaniss, Judge.

William Tomskey, for Appellant.

U. S. Webb, Attorney General, C. M. Fickert, District Attorney, and James F. Brennan, Assistant District Attorney, for Respondent.

COOPER, P. J.—The defendant was charged in the information with the crime of felony in willfully and feloniously placing and leaving his wife in a certain house of prostitution known and designated as No. 50 Bartlett alley, situated in the city and county of San Francisco, and with permitting his wife to remain in said house. To the information he entered a plea of not guilty, and after the evidence was in the jury returned a verdict finding him guilty as charged in the information. Judgment was accordingly entered upon said verdict, and this appeal is prosecuted from the judgment and from the order denying defendant's motion for a new trial. The case comes here upon the judgment-roll and a bill of exceptions.

The defendant's counsel in his brief states that the defendant was convicted upon the uncorroborated testimony of his wife, and that the said testimony was contradicted in every material particular, and "it then became a question of veracity for the jury to determine." The brief then states: "The evidence presented by the people was insufficient to justify the verdict." No other or different argument is made in regard to the insufficiency of the evidence, nor is it pointed out in any way, nor at all, as to what the evidence was or the respects wherein it was insufficient. In such case we do not deem it our duty to consider the sufficiency of the evidence, but will regard it as sufficient.

The wife of the defendant testified that her husband went with her after telling her the place where she could find employment, and that she first went with her husband to 46 Bartlett alley, and that she found that it was not the right house, and the woman at 46 Bartlett alley accompanied her to No. 50, where she talked to the woman at No. 50. She was

then asked by defendant the following question: "Now, what conversation, if anything, did you have with the lady living at No. 46?" This question was objected to by the district attorney, and the objection was sustained. It is claimed that the court erred in sustaining the objection to this question. It appears by an examination of the record that in answer to the question immediately following the witness answered that she had no conversation with any person at No. 46 prior to the time she went to No. 50. Therefore, if the question was material, it was afterward answered by the witness that she had no such conversation.

It is also urged that the court erred in sustaining an objection made to the following question asked of the defendant by his counsel when he was upon the stand: "Did you make a statement to them there regarding your wife?" The question had reference to the fact that defendant had taken his children to or permitted them to be placed in care of the Society for the Prevention of Cruelty to Children, and that he went there and had some conversation with regard to his children and his wife. Nothing was said in reference to the character of the statement that was made by defendant, or what was the object of it, and we are not told in the brief. By an examination of the record we cannot determine that the question related to a material matter. Any self-serving declaration made by defendant at that time to third parties would not be admissible.

There is no other error complained of, and hence it follows that the judgment and order must be affirmed, and it is so ordered.

Kerrigan, J., and Hall, J., concurred.

[Civ. No. 548. First Appellate District.—May 16, 1910.]

**EVELINE A. GRIGGS, Appellant, v. JOHN HARTZOKE,
Respondent.**

TAXATION — CITY TAXES — CITY ORDINANCE AUTHORIZED BY GENERAL LAW—ASSESSMENT AND COLLECTION—SALES TO STATE.—Where by the general law of 1895 (Stats. 1895, p. 213), any city or municipal corporation, not of the first class, was authorized, by ordinance, to provide for the assessment and collection of its city taxes by the same methods employed by county officers, and by ordinance of the city of San Jose, it was so provided, all of its city taxes must thereafter be assessed and collected by the ordinary machinery employed for the assessment and collection of state and county taxes, including sales to the state, in case of delinquency for the city tax, as well as for the state and county taxes, and the passage of title to the state, in case of nonredemption thereof.

ID.—DEED TO STATE — QUIETING TITLE — CROSS-COMPLAINT TO ENFORCE TAX TITLE — NONANSWER — ADMISSION OF LEVY OF CITY TAX.—Where a deed had passed to the state for city, county, and state taxes, and the complaint was so framed as to cover the elements of an action of ejectment and to quiet title, and the defendant set up a tax title acquired from the state by way of cross-complaint under a deed for city, county and state taxes, to which no answer was filed, it cannot be objected by plaintiff that no city tax was levied for the year for which the sale was made, that fact alleged in the cross-complaint being admitted by failure to deny the same.

ID.—EFFECT OF RECITAL IN DEED TO STATE—PRIMA FACIE EVIDENCE.—Where the deed to the state recited that a levy had been made for the city taxes, such recital, under the provisions of section 3186 of the Political Code, is *prima facie* evidence of its truth.

ID.—DEED FROM TAX COLLECTOR TO STATE'S GRANTEE.—*Held*, that the deed of the state's title to the defendant by the tax collector was executed in the usual form, and that it was sufficient in form to divest the state's title and pass it to the grantee.

ID.—RECITALS REQUIRED—IMMATERIAL DISCREPANCY.—Neither the total tax nor the amounts which go to make it up were required to be recited in the tax deed. It is the amount of the assessment which must be recited, both in the certificate of sale and tax deed, and it is sufficient that this is the same in both documents. A variance of a few cents in the recital of the tax levied for county purposes, between the certificate and the deed, is immaterial.

ID.—NOTICE OF SALE BY STATE—INCORRECT COMPUTATION OF INTEREST—FAILURE OF REDEMPTION—SALE NOT VOID.—The mere fact that

there was a mistaken computation of interest in the notice of sale by the state would not render the sale by the state void under the present law, under which the property belonged to the state, and it might sell it for a sum in excess of the amount of the tax, where the plaintiff failed to redeem and tender the amount due before the sale.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order denying a new trial. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

Will M. Beggs, and A. H. Jarman, for Appellant.

Nicholas Bowden, for Respondent.

KERRIGAN, J.—This is an appeal by plaintiff from the judgment in favor of defendant, also from an order denying her motion for a new trial and from an order denying her motion to vacate the judgment, amend the conclusions of law, and enter a different judgment, the last-mentioned motion being made under sections 663 and 663A of the Code of Civil Procedure.

The complaint in this action is so framed as to cover both the elements of an action in ejectment and an action to quiet title to the land described in the complaint, which is situated within the city of San Jose. Defendant answered, and also filed a cross-complaint, setting up title in himself by virtue of a tax deed.

The facts presented by the record are briefly as follows: On July 26, 1897, plaintiff purchased the property, and on March 1, 1898, it was assessed to her at \$4,260. According to the assessment the amount of taxes on said property for the year 1898 was, for county purposes \$26.07, for city purposes \$54.74, and for state purposes \$20.79. Said taxes were not paid, but became delinquent, and costs, penalties and charges accrued thereon in the further sum of \$13.17. Nearly five months after plaintiff purchased the property, to wit: December 21, 1897, she delivered to Eveline Dubois a mortgage thereon as security for the payment of \$8,000, which was not recorded until March 12, 1898. The mortgage being for more than the assessed value of the property, it may be supposed that

plaintiff assumed that the mortgagee would have the mortgage assessed and pay taxes thereon, and that there would be no assessment against the land as distinct from the mortgage. However that may be, taxes on the property for the year 1898 were not paid, nor were they paid for any year thereafter up to and including the year 1904. The taxes for the year 1898, as mentioned above, having become delinquent, the county tax collector on June 27, 1899, duly executed a certificate of sale of said property for nonpayment of city, county and state taxes for that year to the state of California. Subsequently on July 25, 1904, he made and executed a deed to the state for the nonpayment of such taxes. Thereafter the tax collector, pursuant to an authorization from the controller, advertised the property for sale and sold the same to the defendant.

The first question raised by the appellant is, Has the state, through the county tax collector, authority to sell property for delinquent municipal taxes due the city of San Jose?

The city of San Jose is governed by charter (Stats. 1897, p. 592). Article IV thereof deals with the subject of revenue and taxation, and in substance provides that the mayor and common council shall have full power and authority to assess, levy and collect taxes, and that the city may by ordinance avail itself of the privilege of having its taxes assessed and collected by the county officers. It is also the duty of the mayor and common council, under section 4 of said article, in providing for levying and collecting city taxes, to be governed by state laws relating to the levying and collecting of state and county taxes as far as applicable. This section further provides that "all sales and conveyances of property made and executed for the nonpayment of delinquent taxes shall have the same force and effect as when made and executed for the nonpayment of taxes levied for state and county purposes." By general law (Stats. 1895, p. 219) the legislature provided that the governing body of any municipal corporation, such as the city, by ordinance might avail itself of the privilege of having its taxes assessed and collected by county officers. The common council of San Jose, pursuant to section 3 of article IV of said charter, did pass such an ordinance, and thereby brought itself within the provisions of the said general law. Section 1 of the act of 1895 among

other things provides that after a city, by ordinance, has availed itself of this act, "all assessments shall be made and taxes collected by the assessor and tax collector of such county." Section 5 provides for the adding of a separate column for the city tax to the general county assessment-book. It provides further that "such taxes so levied shall be collected at the same time and in the same manner as state and county taxes; and when collected the net amount ascertained by sections six and seven of this act shall be paid to the . . . municipal corporation or city to which it respectively belongs, under the general requirements and penalties provided by law for the settlement of other taxes." Section 9 provides that "whenever any real property situate in any city or municipal corporation which has availed itself of the provisions of this act, has been sold for taxes and has been redeemed, the money paid for such redemption shall be apportioned by the county treasurer to such city or municipal corporation in the proportion which the tax due to such city or municipal corporation bears to the total tax for which such real property was sold."

In brief, a reading of the entire act of 1895 shows a clear intent on the part of the legislature to make provision for the collection of municipal taxes under the ordinary machinery employed in collecting taxes for county and state purposes.

The manner and time for the collection of state and county taxes are established in chapter VII, title IX, part III, of the Political Code (secs. 3746-3819, inclusive). And so far as the state and county taxes are concerned, it is not disputed that the proceedings in the case under consideration were regular. Proceeding under the act of 1895 and the ordinance passed under the authority of the charter, the city taxes for which the land in controversy was sold were collected at the same time and in the same manner as the state and county taxes by the county tax collector, and in view of the circumstances related this official not only had the power but it was his plain duty to make the collection in this way.

Plaintiff next contends that there is no evidence that the city of San Jose ever authorized or levied a tax for the year 1898, and that therefore the deed made by the county tax collector to defendant is void.

By failure to deny in her answer the allegation in the cross-complaint of such levy the plaintiff admitted it. Moreover, the deed of the property to the state recited that such a levy was made, and under the provisions of section 3786 of the Political Code such recital is *prima facie* evidence of its truth. (*Rollins v. Wright*, 93 Cal. 395, [29 Pac. 58].)

The deed from William A. January, tax collector, to the defendant was executed in the usual form, and it was sufficient in form to divest the title of the state. (Pol. Code, sec. 3898; *Chapman v. Zoberlein*, 152 Cal. 216, [92 Pac. 188]; *Baird v. Munroe*, 150 Cal. 560, [89 Pac. 352]; *Bank of Lemoore v. Fulgham*, 151 Cal. 234, [90 Pac. 936].)

Section 3786 of the Political Code requires that the tax deed recite the matters recited in the certificate of sale, and by section 3776 of the same code the matters to be set forth in the certificate of sale are enumerated. In this case the certificate of sale recited that the tax levied for county purposes was \$26.07. The deed recited that the tax for county purposes was \$26.04. Plaintiff claims that these recitals being different, the deed to the state is void, but neither the total tax nor the amounts which go to make it up are required to be stated. It is the amount of the assessment which must be recited, and that is the same in both documents.

The notice of sale by the state is required to contain a detailed statement of all delinquent taxes, penalties, costs and expenses up to the date of sale. (Pol. Code, sec. 3897.) The notice under which the sale was made in this case incorrectly computed the interest, and accordingly the property was sold for an amount slightly in excess of the amount of taxes, penalties, interest and costs; and plaintiff claims that on this account the deed from the state to the defendant is void. Under the statute as it formerly read, when the property was sold to the person who would take the least quantity of land for the amount of the tax, a sale for more than the tax was void. But under the present law this property belonged to the state, and it might sell it for a sum in excess of the amount of the tax. (*Fox v. Wright*, 152 Cal. 59, 62, [91 Pac. 1005].) And while it may be that if the state failed to publish, post or mail the required notice of sale, or improperly described the property in such notice, a sale made thereunder might be void as to plaintiff, still in this case, as the

plaintiff before the sale could have tendered the true amount due and redeemed the property, the mere fact that it was sold for a little more than the exact amount due does not render the sale void.

The judgment and orders are affirmed.

Cooper, P. J., concurred.

HALL, J.—I concur in the judgment, but in addition to what is said in the opinion prepared by Justice Kerrigan concerning the regularity of the sale of the property in suit by the state to the defendant, I am of the opinion that plaintiff is in no position to attack the title or possession of defendant, who is in possession claiming title under the sale by the state and the deed thereunder. By the deed to the state, under the sale for unpaid taxes, the plaintiff was divested of all title to the property in suit. "Such deed conveys to the state the absolute title to the property described therein. . . ." (Pol. Code, sec. 3787.) Her only right was a right to redeem or repurchase from the state, by complying with the provisions of section 3817, Political Code. This she has not done or offered to do. The owner of real property sold and conveyed to the state for unpaid taxes has no title thereto until he has redeemed under the provisions of section 3817, Political Code. Such redemption is in effect a repurchase. Not only is it expressly provided by section 3787 that the deed to the state conveys the absolute title to the state, but it is provided by section 3817 that the recordation of the controller's receipt for the redemption money shall have the effect of a reconveyance of the interest conveyed by the deed to the state. It is thus clear that the delinquent property owner has no title intermediate the sale and deed to the state, and the redemption from the state. Having neither redeemed nor offered to redeem under the provisions of section 3817, Political Code, plaintiff is in no position to attack either the possession or title of defendant, claiming under the sale by the state and the deed thereunder.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 14, 1910.

[Civ. No. 756. Second Appellate District.—May 17, 1910.]

SIRCH ELECTRICAL AND TESTING LABORATORIES,
Respondent, v. **F. A. GARBUTT,** Appellant.

CONTRACT TO CONSTRUCT AND INSTALL ELECTRICAL PLANT—NONPERFORMANCE AND DELAY—PAYMENT IN FULL—WAIVER OF COUNTERCLAIM—SUPPORT OF FINDINGS.—In an action to recover an alleged balance due on a contract to construct and install an electric lighting and heating plant, where defendant denied any balance due, and counterclaimed damages for nonperformance and delay in performance, and the court found for defendant as to any balance due, and found that defendant paid plaintiff in full for the plant, with full knowledge of the facts on which the counterclaim was based, and found against defendant on the counterclaim, and that such counterclaim was waived, it is held that the evidence in the record sustains such findings.

ID.—WORK DONE UNDER DEFENDANT'S INSTRUCTIONS—PAYMENTS MADE AS WORK PROGRESSED—SUPPORT OF FINDING—FULL PAYMENT WITH KNOWLEDGE.—Where it appears that the work was done by plaintiff's agent under defendant's instructions, between April and December, 1907, and that the work was paid for as it progressed in fourteen checks running from April 29, 1907, to December 21, 1907, thus completing payment in full, the evidence fully sustains the finding that full payment was made with full knowledge of all the facts on which the counterclaim was based. It was not necessary that the entire work should be completed before there could be an acceptance of and payment for any part of the work by defendant.

ID.—LATER MUTUAL CHARGES OF BAD FAITH.—The fact that later correspondence between the parties contained mutual charges of misrepresentation and bad faith, made by each to the other, is not evidence that defendant did not accept and pay for the entire work done by plaintiff.

ID.—DECISION AS TO WAIVER OF CLAIM FOR DAMAGES NOT AGAINST LAW. The decision that there was a waiver of the claim for damages is not against law. The defendant, who, with full knowledge of all the defects in the work, accepted and paid for it, thereby waived his claim for damages.

ID.—COMMON COUNT NOT INVOLVED—EXTINCTION OF OBLIGATION FOR BREACH OF CONTRACT—ACCORD AND SATISFACTION.—There is no common count in the complaint. The case is one in which the court has found that goods and labor, to a certain value, had been furnished under the contract, and so accepted by the defendant. There has been an extinction of the obligation of plaintiff to make good the breach of the contract of which it was guilty by an acceptance

of the work by the defendant, which is in the nature of an accord and satisfaction.

ID.—GROUND FOR RETENTION BY PLAINTIFF OF DEFENDANT'S MONEY.—

The court did not recognize plaintiff's right to retain the money received from defendant, on the ground that the goods furnished and services rendered were reasonably worth that amount, but because defendant accepted them in compliance with the contract, and paid that amount for them.

ID.—ALL GROUNDS OF DAMAGE NEGATIVED BY FINDINGS.—

It is held that all the grounds of damage set up in the counterclaim were negatived by the findings of the court.

APPEAL from a judgment of the Superior Court of Los Angeles County. Chas. Monroe, Judge.

The facts are stated in the opinion of the court.

J. L. Murphey, and Murphey & Poplin, for Appellant.

C. S. Tappan, for Respondent.

TAGGART, J.—Action to recover balance due on contract for constructing and installing an electric lighting and heating plant, with counterclaim for damages for failure to comply with contract. Judgment was for defendant for his costs on the complaint and for plaintiff on the counterclaim. Defendant appeals from that part of the judgment which denies him relief on his counterclaim, and the record is presented under the alternative method.

The plaintiff agreed to construct, on a boat belonging to defendant, an electrical plant to be comprised of engine, generator, switchboard, storage batteries, electric cooking range, searchlight and the necessary wiring and equipment to operate the same; to perform the labor necessary to install the plant, and do the engineering required for and the superintending of the installation of said plant; for which defendant was to pay the actual cost of material and apparatus purchased and manufactured, seventy-five cents per hour for labor in installing the plant, transportation of workmen from Los Angeles to San Pedro and their board and lodging at the latter place if they remained there while engaged in the work; and for engineering and superintending fifteen per cent of the actual cost of the plant, such cost in any event to be

not less than \$2,500 for this purpose. The complaint alleges that plaintiff expended \$3,700.81; that there was additional apparatus purchased by it in the sum of \$320.39 for use in the plant, which was billed to defendant, upon which it is entitled to a commission; that there have been paid on said items, respectively, \$3,437.64 on account of materials, and \$200 on account of commissions, leaving an unpaid balance of \$666.72 due from defendant to plaintiff.

The answer denies that the materials were of any greater value than the sum paid by defendant to plaintiff, and denies any indebtedness on account of commissions, for the reason that the contract was not complied with by plaintiff and no commissions earned. The counterclaim of defendant of \$5,754.03 is made up of the \$3,437.64 paid to plaintiff for materials, which it is contended are lost to defendant because the plant is valueless and useless to him, except that portion thereof which may be used as a lighting plant, which is of the value of \$1,000, and certain fixtures, air-compressor and searchlight of the value of \$320.39; and the further alleged items of \$1,000 damages for loss of use of the boat for two months owing to delay of plaintiff with the work done; \$500 damages for loss of use of the plant for six months; and \$500 for completion of installation of parts of the plant left unfinished by plaintiff.

The trial court found the contract to have been made as alleged; that plaintiff pursuant thereto purchased material and apparatus and performed labor to the value of \$3,610.98, but did not complete said plant in accordance with the contract; that "defendant had paid to plaintiff [said sum (\$3,610.98)] with full knowledge that said contract had not been carried out in accordance with the agreement entered into between plaintiff and defendant; . . . that by reason of said failure to complete said contract [plaintiff] is not entitled to recover any further or additional remuneration for said services rendered, other than said sum of \$3,610.98, paid by defendant to plaintiff under the terms of said contract"; that defendant was not damaged in any sum whatever by reason of the delays in installing the plant, and that defendant is not indebted to plaintiff in any sum under the contract. The two findings, however, as to which appellant principally urges error are as follows: "VI. That defendant was fully informed

of the fact that said plant had been improperly installed by plaintiff, and defendant acquiesced in any and all delays in the installation of said plant, and, with full knowledge of said facts, the defendant paid said sum of \$3,610.98 to plaintiff"; and "IX. The court further finds that, in respect to the counterclaim of defendant against plaintiff, any damage suffered by reason of the nonperformance of said contract by plaintiff has been waived by reason that defendant, with full knowledge of said facts, having paid for and accepted said work."

We are of opinion that there is evidence in the record to sustain these findings. While defendant testified that he was not an electrical expert, he further testified that after he became suspicious of the electrical ability of plaintiff's supervising manager, Mr. Sirch, he consulted experts and took their advice in the matter; that he was "on the job" generally six or seven times a week, always once a week, for two or three hours; and that, at the second visit of Sirch to the boat, he (Sirch) was guilty of such manifest absurdities in his attempts to take measurements of the boat for the purpose of installing the plant as caused the defendant and his construction foreman to look at each other and smile. This was before any work was done on the contract. The witness Sirch also testified that defendant personally directed the designing, the placing of the conduits and their quality, and passed upon every step as the work progressed, including the wiring of the circuits and how they would have to be and the location of each piece of machinery. "He instructed what he wanted there and I did what he said." The bill of particulars rendered by plaintiff shows services performed and material furnished between April and December, 1907, principally prior to September, and the fourteen checks of defendant introduced as evidence of payments made by him to plaintiff for the work done under the contract bore dates running from April 29, 1907, to December 21, 1907. This would seem to support finding VI without further examination of the record. That the later correspondence between the parties contained charges of misrepresentation and bad faith made by each to the other is not evidence that defendant did not accept the work as done by plaintiff. It was not necessary that the entire work be completed before there could be an acceptance of any of

the work by the defendant. There was evidence to sustain the finding of the court to this effect.

The contention of appellant that the decision is against law is equally untenable. The defendant with full knowledge of all the defects in the work accepted and paid for it, and he thereby waived his claim for damages. This is not a case in which judgment has been given on a *quantum valebat* or *quantum meruit* count, but one in which the court has found that goods and labor to a certain value have been furnished under the contract and so accepted by defendant, notwithstanding they were not up to the standard fixed by the contract. In other words, there has been an extinction of the obligation of plaintiff to make good the breach of contract of which it was guilty by an acceptance of the work by defendant, which is in the nature of an accord and satisfaction. The court did not recognize the plaintiff's right to retain the amount received by it from defendant on the ground that the goods furnished and services rendered were reasonably worth that amount, but because defendant accepted them in compliance with the contract and paid that amount for them. There is no common count in the complaint.

The residue of the damage claim of defendant, which covered all but the matters which the court found were accepted, consisted of damages for delay, repairs, etc., and all these were negatived by the court's findings.

Judgment affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 806. Second Appellate District.—May 18, 1910.]

MARCUS S. KOSHLAND et al., Appellants, v. F. C. CHERRY et al., Trustees of City of San Luis Obispo, and Superintendent of Streets, Respondents.

PUBLIC ALLEY — CUL-DE-SAC — FULL BOUNDARY — TITLE DEEDS — TOWN PATENT — PUBLIC TRUST.—Where a public alley known as "Rose alley" formed a *cul-de-sac* about twelve feet wide, extending originally from Monterey street into block 13 of the city of San Luis Obispo, and terminated at the center of San Luis Obispo creek, and all of appellant's title deeds described it accordingly, and the testimony shows that it had been used both for watering stock and for delivering goods at a store bounding thereon, and that it was so used from 1862 to 1868, when the town patent was obtained, the trust for which the town trustees took the title therefor was to maintain it throughout its entire length, as a public alley.

ID.—OBSTRUCTION OF ALLEY BY STORE—GATE—LONG USER—PRESCRIPTIVE RIGHT NOT OBTAINABLE AGAINST CITY.—Where in 1884 plaintiffs constructed a store on the alley and closed it by a gate, leading into the rear yard of their store, and used the property in that way for about twenty-three years before the city trustees and superintendent of streets ordered such gate to be removed and the ally opened to its full width, such long occupation could create no prescriptive right against the city.

ID.—USER NOT DEEMED ADVERSE TO PUBLIC RIGHT.—Any user by plaintiffs or their predecessors in interest of a public alley could not be presumed to be adverse to the rights of the public.

ID.—ACCEPTANCE OF HIGHWAY BY USER—STANDARD—PURPOSE OF WAY. In ascertaining whether or not a highway, public park or public place has been accepted by user, the purpose which the way, park, or place is fitted or intended to serve must be the standard by which to determine the extent and character of the use which constitutes an acceptance.

ID.—ACCEPTED HIGHWAY NOT DESTRUCTIBLE AS A GENERAL RULE—ABSENCE OF ESTOPPEL.—A public highway cannot, as a general rule, be destroyed or acquired by adjacent private proprietors by adverse holding, where there is no element of estoppel which could bring the case within any exception thereto.

ID. — ACTION TO ENJOIN CITY AUTHORITIES FROM INTERFERENCE WITH GATE — JUDGMENT OF NONSUIT — AFFIRMANCE.—In an action by plaintiffs to enjoin the city trustees and superintendent of streets from interference with plaintiffs' gate after twenty-four years' user thereof, it is held that a judgment of nonsuit was properly entered against the plaintiff, and that such judgment should be affirmed.

APPEAL from a judgment of nonsuit of the Superior Court of San Luis Obispo County, and from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

R. V. Bouldin, and C. P. Kaetzel, for Appellants.

Thomas A. Norton, and W. H. Spencer, for Respondents.

TAGGART, J.—Action to restrain city from removing gate erected across alley by plaintiffs. Plaintiffs appeal from judgment of nonsuit and an order denying their motion for a new trial.

Rose alley is a *cul-de-sac* about twelve feet wide, extending from Monterey street into block No. 13 of the city of San Luis Obispo and terminating at the center of a creek in the middle of the block called San Luis Obispo creek. Plaintiffs' property extends along one side of the alley its full length. The wall of a building thereon, commonly known as the Sinsheimer store, follows the line for about one hundred feet of the way and a fence and warehouse, belonging to plaintiffs, the rest of the distance. When the Sinsheimer building was erected, some twenty-three years before the trial of this action, a gate was built by plaintiffs' predecessors in interest across the alley at the southeast corner of the building, and ever since that time the occupants of the Sinsheimer store have controlled and occupied the rear end of the alley as a part and parcel of the back yard of that building and used the other portion of the alley as a way to and from the rear of their premises. The defendants, as the trustees and superintendent of streets of the city, threaten to tear down the gate and open up the alley to the use of the public its entire length; hence this action.

The complaint alleges ownership and possession, continuous inclosure, use, and occupancy of the premises by plaintiffs and their predecessors in interest "as a back yard and for storage purposes," and the ownership of the gate in question. It further alleges that there never has been a street, alley, road, public or private, across said parcel of land or any part thereof; that no proceedings were ever taken to acquire it for

road purposes, no such use made of it, no money expended in its maintenance and no acceptance of it as a street.

The title papers stipulated as introduced were a deed from one Brizzolara to Sinsheimer, a deed from Sinsheimer and wife to S. Koshland, and a decree of distribution in the estate of S. Koshland, deceased, to plaintiffs, in all of which instruments Rose alley is called for as a boundary line from the center of the creek to Monterey street. It appears by the oral testimony of the chairman of the board of trustees of the town of San Luis Obispo, at the time, that he received the patent from the United States government for the city "in trust for the occupants," about 1868. (The patent was not introduced and no plat or survey of the town or city or the field-notes are in the record.) This witness further testified that at the date of the patent he knew the place that is called Rose alley, and "I can't at that time say whether I saw any particular travel over said alley." He was in San Luis Obispo off and on in 1852 and 1853, and made it his permanent residence after 1857. The city clerk, who was the only other witness, testifying to the early user of the land, said he had been familiar with Rose alley since 1862, and that from that time down there had been travel through it. "It was simply used for taking horses in there to water and also delivering goods to the Brizzolara store." That formerly the gate was in the side line of the alley running down from the building on the premises to the center of the creek, instead of across the alley.

It is not quite clear whether appellants rely upon an adverse title to or an easement or way acquired over the premises in question. It is stipulated that no taxes have ever been paid on the premises by plaintiffs or their predecessors in interest, but to this, in support of their theory of an adverse title acquired, they reply that there is no evidence that any taxes have ever been assessed against the property. If this were a public alley, as defendants contend, there would be no assessment of it, and the case may be considered upon this basis. So, also, it must be admitted that any user by plaintiffs and their predecessors of a public alley for the purposes of an alley could not be presumed to be adverse to the public's right. There is no evidence in the case to which application can be made of the authorities cited by appellants, that the

title of a city to lots held for sale for building or other private purposes may be lost by adverse possession. (*Ames v. San Diego*, 101 Cal. 390, [35 Pac. 1005]; *San Francisco v. Straut*, 84 Cal. 124, [24 Pac. 814].) There is nothing in the record from which it can be determined that Rose alley is a lot or parcel of land "remaining unproved" under section 9 of the act of March 23, 1868. (Stats. 1867-68, p. 247.) Neither can it be said that this alley was one laid out by the Harris and Ward map, or any other map or survey made after the title thereto had vested in the town authorities of San Luis Obispo in trust for the owner, as was the case with the tract considered in *Cerf v. Pfleging*, 94 Cal. 131, [29 Pac. 417]. The meager testimony in the record shows without contradiction that Rose alley was known as such and used for the purposes of an alley as early as 1862, and so continued down to the issuance of the patent by the United States. The trust for which the town trustees took the title to it, therefore, was to maintain it as an alley.

In ascertaining whether or not a highway, park or public place has been accepted by user, the purpose which the way, park or place is fitted or intended to serve must be the standard by which to determine the extent and character of use which constitutes an acceptance. Rose alley was not a thoroughfare, and the uses to which it could be put by the public were, of course, somewhat limited. The taking of horses to water in the creek during the early days was a common use such as the public might have made of it. So also the gaining of access by the people at large to the surrounding property by delivery wagons, as well as to the stream of water. The testimony does not show that this use was limited exclusively to the delivery wagons of the occupants of the premises now owned by plaintiffs. An accepted public highway cannot, as a general rule, be destroyed or acquired by adjacent private proprietors by adverse holding, and there is no element of estoppel here which would bring the case within any exception suggested.

Judgment and order appealed from affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 811. Second Appellate District.—May 18, 1910.]

S. W. RAND, Respondent, v. COLUMBIAN REALTY COMPANY, a Corporation, Appellant; COLUMBIAN INVESTMENT COMPANY, a Corporation, Codefendant.

PLEADING—INDEBITATUS ASSUMPSIT—MONEY HAD AND RECEIVED—“USE OF PLAINTIFF” NOT AVERRED—EXPRESS PROMISE.—In pleading a count of a complaint in *indebitatus assumpsit* for money had and received, the omission to aver that the money was received “to the use of the plaintiff” would be fatal were it not that the count alleges a direct promise of the defendant appealing to repay the money, which had the effect to make the count sufficient to state a cause of action.

ID.—DIFFERENT COUNTS BASED ON SAME TRANSACTION—ELECTION NOT REQUIRED.—Where all of the different counts of the complaint were based upon the same transaction, and had reference to the same identical sum of money, the court did not err in refusing to compel the plaintiff to elect between the counts.

ID.—FIRST COUNT BASED ON FRAUD—REPRESENTATIVE AGENCY IN OBTAINING MONEY—PROMISE OF APPELLANT—CAUSE OF ACTION.—Where the first count of the complaint was based on fraud between defendant corporations in obtaining money from plaintiff without consideration, under a contract with the investment company, used as representative agent of the realty company, under fraudulent representations, all of the money having been received by the realty company, which promised to pay the same, and did pay part but refused to pay the residue, such count states a cause of action against the realty company to compel payment of the residue.

ID.—INCONSISTENT FINDINGS—REVERSAL.—A general finding that the allegations made in the first count of the complaint were not sustained is inconsistent with findings in favor of the second count of *indebitatus assumpsit* based upon the same express agreement stated in the first count, which is found to be untrue, and such inconsistency is ground for reversal of a judgment based on the second count.

ID.—SUPPORT OF FINDING UNDER SECOND COUNT—PRESUMPTIVE NATURE OF EXPRESS AGREEMENT—DIRECT INCONSISTENCY.—The support of the finding under the second count of the complaint as to the express agreement, which must be presumed to be based upon sufficient evidence where there is any evidence in the record tending to sustain it, and there appearing to be but one agreement shown in the record, must rest upon the theory that the court determined under the evidence that the money was obtained either fraudulently and through misrepresentation, or by means of some agency or repre-

sentative of appellant. But this finding so supported is directly and absolutely inconsistent with the finding that no express agreement was made under the first cause of action, which related to the same facts and circumstances surrounding the transaction.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. E. S. Torrance, Judge rendering judgment. W. R. Guy, Judge denying new trial.

The facts are stated in the opinion of the court.

Wadham & Pritchard, for Appellant.

Cassius Carter, and Eugene Daney, for Respondent.

ALLEN, P. J.—The complaint as originally presented to the trial court contained five counts. The first thereof alleged that the defendants, the Columbian Realty Company and the Columbian Investment Company, were each regularly organized corporations carrying on business under the same management and control, acting jointly in real estate operations; that appellant was a solvent affair, while its co-defendant was wholly irresponsible; that appellant took the title to all property purchased by the investment company, paying the purchase price thereof; that this was in furtherance of a scheme through which the appellant was to acquire property without incurring liability on account of the purchase, and the investment company was to assume the obligations, thus effecting a fraud upon those with whom it contracted to purchase property or do business; that at the date named, under this arrangement and agreement, the investment company acquired an option to purchase certain premises in San Diego county, such option being taken in the name of the investment company, but, in fact, for the use and benefit of appellant realty company; that the investment company, pretending to be the owner of such option, contracted with plaintiff and his assignor to sell to them an undivided one-half of the land covered by said option for \$17,500 part in cash and the balance in time; that when the cash payment came to be made, the same was made to the appellant under representations by the managing officers thereof that the two corporations were the same and that the invest-

ment company was a part and parcel of the realty company: that after the cash payment was made both corporations permitted the option to expire but that after the expiration of such option the realty company collected from plaintiff, who had no knowledge of the expiration of such option, a large amount of the purchase money; that thereafter, and after plaintiff became aware of the expiration of the option and the failure of consideration, he demanded a return of his money and the same was agreed to; that the written agreement to refund such money was signed by the investment company; that after such agreement was entered into the realty company repaid a large part of the money received, but refused to repay the sum of \$7,839 and more, for which the suit was brought, it being made to appear that a part thereof was paid by plaintiff and a part thereof by the assignor of plaintiff.

The second cause of action was one in *indebitatus assumpsit*, alleging indebtedness to plaintiff for money had and received, with the additional allegation of an express promise to repay the same, the amount being similar to that mentioned in the first cause of action. In such count there was no allegation that the money was had and received to the use of plaintiff. The other remaining three counts in the complaint were obviously for the recovery of the same sum in different forms.

Demurrer was interposed to the complaint and each count thereof and overruled by the court; and it is insisted that the second count was insufficient, in that it omitted to allege that the money was had and received to the use of plaintiff. This omission would have been fatal were it not that the complaint contains an allegation of a direct promise to repay, which had the effect to state a cause of action. Motion to require the plaintiff to elect upon which count he would proceed at the trial was denied. All of the various counts in the complaint having reference to the same transaction, and being for the recovery of the identical sum, we see no error in the action of the court refusing to require an election.

Upon the trial of the action the court found that within two years last past the appellant became and was indebted to plaintiff and to his assignor in the sum named on account of moneys had and received of the said parties as alleged in plaintiff's second cause of action; found in favor of plaintiff

as to the assignment of the portion thereof as alleged; found that the appellant had repaid the money which had been repaid under the agreement; and further found that all other allegations of plaintiff's complaint, except those admitted by the answer of defendant realty company, are not sustained, and judgment went for plaintiff and against appellant upon the second cause of action alone. Motion for a new trial was regularly filed, which was denied, and from the judgment and order denying a new trial the realty company alone appeals, the action having been dismissed by the court as to the investment company.

The record discloses that the evidence received upon the trial without contradiction showed facts and circumstances connected with the receipt of this money very similar to those involved in the case of *Thomas v. Moody*, 57 Cal. 215; but it will be observed that, notwithstanding the evidence, the trial court found against plaintiff upon the allegations of the first cause of action, which involved all facts upon which an agency might be predicated, the accuracy of which finding is not challenged. The judgment rendered must, therefore, rest upon the sufficiency of the evidence to support the finding of the court that the appellant was indebted at the date named to plaintiff for money had and received, together with the promise of repayment. At common law the common count for money had and received could be used to recover for money obtained by false and fraudulent representations. (1 Chitty's Pleadings, 364; *Minor v. Baldrige*, 123 Cal. 190, [55 Pac. 783].) The promise to repay found by the court can only have support in the proposition that the money was received by appellant either directly or through an agency, or by one holding a representative relation, express or implied. There could be no difficulty in determining from the record that the circumstances of this transaction were such as to establish the receipt of this money by appellant without consideration and in furtherance of a scheme to defraud, or through the investment company as its agent or title-holding branch, were it not for the general finding of the court that the allegations contained in the first cause of action were not sustained. It is the duty, however, of an appellate court to sustain the judgment and support the findings of the trial court if there be any evidence in the record tending to sup-

port such findings. All presumptions are in favor of the correctness of the findings of the trial court and its conclusion. The finding that the money was received as alleged in the complaint, and the complaint alleging a contract of repayment, can only be supported upon the theory that the court determined under the evidence that the money was received fraudulently and through misrepresentation, or by means of some agent or representative as above suggested. This finding, however, which it must be presumed the court based upon the evidence in the record, is entirely inconsistent with the other finding in connection with the first cause of action which related to the same facts and circumstances surrounding the transaction. These two findings are so at variance that a reversal of the judgment is made necessary.

Judgment and order reversed and cause remanded for further proceedings.

Shaw, J., and Taggart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 17, 1910.

[Civ. No. 812. Second Appellate District.—May 18, 1910.]

GEORGE W. BECK, Respondent, v. FRED SCHMIDT, Appellant.

BUILDING CONTRACT—ORAL MODIFICATION—REFUSAL OF OWNER TO MAKE PAYMENTS AGREED—TERMINATION—QUANTUM MERUIT.—Where a building contract was orally modified by agreement of the parties, extending the time for completion, and providing for more frequent payments, and the court found that the owner neither complied with the contract nor with the oral modification as to payments, and that the contractors continued the work until, by reason of the failure of the owner to make such payments, they considered and treated the contract as terminated, and refused to continue the prosecution of the work, these facts, if true, clearly justified the contractors in such course, and entitled their assignee to recover upon *quantum meruit* the reasonable value of the work theretofore done and materials furnished.

ID.—SUPPORT OF FINDINGS—WRITTEN CONTRACT NOT PART OF RECORD.—

Where the written contract was introduced in evidence, but is not made part of the record, nor its contents shown therein, it cannot be said that the evidence was insufficient to sustain the findings that the owner did not comply with the written contract as to payments, and that the plaintiff complied with the contract on their part until prevented by such noncompliance.

ID.—EVIDENCE SUPPORTING ORAL MODIFICATION.—The evidence in the record supports the finding as to a subsequent modification of the contract agreeing to weekly payments sufficient to meet the payrolls of the men employed and in furnishing materials therefor, and also extending the time for performance of the work. But the written contract not being in the record, it cannot be said that the time of performance fixed therein did not fix a date subsequent to the cessation of the work for nonpayments agreed upon.

ID.—EVIDENCE SUPPORTING ARREARS OF PAYMENT.—The evidence tends to prove that defendant was in arrears of payment practically from the commencement of the work, and that defendant quit the work for persistent refusal of defendant to make the payments agreed upon during a period of three months.

ID.—EFFECT OF ABSENCE OF CONTRACT.—In the absence of the written contract or any evidence as to its terms and provisions, it cannot be said that any of the findings complained of are not supported by the evidence. Even if it be conceded that the finding as to the oral modification thereof was unsustained, it would be harmless, in view of the finding that defendant failed to comply with the written contract, and that defendant did not comply with it on his part until, owing to its breach, the contractors ceased work.

ID.—NONSUIT PROPERLY DENIED.—The court properly denied defendant's motion for a nonsuit of the plaintiffs in the view of the evidence before the court.

ID.—RULINGS UPON EVIDENCE—ERROR NOT SHOWN.—Assignments of error in rulings upon evidence as to damages resulting from failure of the contractors to complete the work within the time specified cannot be considered, where there is nothing in the record upon which it can be determined that the court erred in making such rulings.

ID.—PLEADING—NONPAYMENT—AMOUNT "DUE AND OWING."—Where the complaint formally and in direct terms alleged nonpayment of the demand of the contractors sued for, the objection that it does not also allege that the amount is "due and owing" is untenable. No good purpose could be subserved by inserting words constituting a mere legal conclusion, from the use of which, at most, and then only in the absence of demurrer, the fact of nonpayment alleged might be implied.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

Davis, Kemp & Post, for Appellant.

Jones & Weller, and Frank G. Finlayson, for Respondent.

SHAW, J.—Action by plaintiff as the assignee of Franklin & Drain, constituting a copartnership, to recover upon *quantum meruit* for labor done and materials furnished at defendant's instance and request in grading and improving a certain tract of land owned by defendant. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant prosecutes this appeal.

It is alleged in the complaint that the reasonable value of the work done and materials furnished was the sum of \$51,095.74, upon which defendant paid \$31,954.30 and no more, leaving a balance unpaid of \$19,141.44, for which plaintiff asks judgment.

In defense of the cause of action defendant by his answer avers that the work was done and the materials furnished pursuant to a written contract made between defendant and said copartnership of Franklin & Drain, by the terms and provisions of which it was agreed that said work was to be performed as a whole, but at prices therein stipulated for each class of work, and the whole completed by December 15, 1906. Defendant further avers that neither the contract price nor the reasonable value of the labor done and materials furnished is in excess of \$40,000, upon which he had paid \$31,954.30, and denies that any balance remains due and unpaid by defendant for and on account of said work. It is further alleged that by said contract it was agreed that twenty-five per cent of the value of the labor performed and materials furnished in doing the work should be reserved and not paid until thirty-five days after the expiration of the time for completion and acceptance of the whole of said work; that neither said contractors nor any one for them has performed the whole work agreed to be done and performed,

and that to complete the same will require an expenditure by defendant of \$5,000 over and above the contract price; that by reason of said failure to perform the contract in accordance with its terms defendant has been damaged in the sum of \$25,000.

The court made findings as to the reasonable value of the work done and materials furnished, the amount paid thereon, and the balance remaining due and unpaid. In response to the affirmative allegations of the answer, the court found that Franklin & Drain, plaintiff's assignors, entered into a contract with defendant for the improvement of the tract of land, and pursuant to the terms and provisions thereof entered upon the performance of the work. It also found that by an oral agreement between the parties the contract was thereafter modified, in that the time for completion of the work was extended and provision made for making the payments other than as stipulated in the contract; that defendant neither complied with the terms of the written contract nor with the modification thereof; that plaintiff and his assignors did not refuse to complete the construction of the work mentioned in the contract or fail to comply with the terms thereof on their part, but did, on September 28, 1907, by reason of defendant's neglect and failure to make the payments pursuant to the terms and provisions of the contract, consider and treat the same terminated and refused to proceed further in the prosecution of the work thereunder.

These facts, if true, clearly justified the contractors in refusing to proceed further with the performance of the work, and entitled their assignee to maintain an action for the reasonable value of the work theretofore done and materials furnished. (*San Francisco Bridge Co. v. Dumbarton etc. Co.*, 119 Cal. 272, [51 Pac. 335]; *Cox v. McLaughlin*, 76 Cal. 60, [18 Pac. 100]; *Porter v. Arrowhead Reservoir Co.*, 100 Cal. 501, [35 Pac. 146].)

Defendant contends, however, that certain of these findings are not supported by the evidence. It is insisted that there is no evidence tending to prove a modification of the contract, and likewise a want of any evidence tending to prove that defendant failed to comply with the provisions of the contract, either as originally made or as claimed to have been modified. The contract was introduced in evidence and the

court made acquainted with its terms and conditions. It is not, however, incorporated in the bill of exceptions, or otherwise brought up in the record; nor is there any evidence touching the terms and provisions thereof. There is evidence as to what the parties did, but the record is wholly silent as to what they were required to do under the terms and provisions of the contract. It is, therefore, impossible for us to say that the evidence was insufficient to show a breach of the contract on the part of defendant, or to support the finding that plaintiff and his assignors fully complied with the contract on their part.

The record discloses evidence to the effect that after the work had been prosecuted for some months, during which time the payments, so far as made, appear to have been in accordance with estimates furnished monthly by an engineer, it was agreed to dispense with these estimates and defendant was to make weekly payments sufficient to meet the payrolls of the men employed by the contractors, and at the end of each month make payments in amount sufficient to meet other necessary expenses incurred in the performance of the work and furnishing the materials therefor. It also tends to prove that defendant in making the payments was in arrears practically from the commencement of the work. On September 16, 1907, plaintiff served notice upon defendant to the effect that, owing to his neglect and failure to pay the several amounts as they became due, it would be impossible to further prosecute the work, and unless payment was made he would abandon the work. Notwithstanding this notice, defendant refused to make a payment of \$120 required to meet the payroll on September 28, 1907, whereupon plaintiff ceased work.

The court finds that the time for completion of the work as fixed in the contract was extended by the oral agreement. The contract is not before us, and the time fixed therein may have been at a date subsequent to the ceasing of work by plaintiff. There is some evidence tending to prove that the time was extended. Franklin testifies: "There was an absolute promise made by Mr. Schmidt that we were to be granted all the necessary time to complete that work." We cannot say that the expression "that work" did not refer to the whole work to be done under the contract, instead of additional work required in the sloping of embankments. Considering the conditions under which the work was done, it

seems to have been prosecuted with reasonable diligence. There is also evidence tending to show that defendant was in arrears in making payments during the period covered by the months of June, July and August.

In the absence of the written contract or any evidence as to its terms and provisions, we cannot say that the findings complained of are not supported by the evidence.

Furthermore, conceding the finding as to the modification of the contract to be unsupported by the evidence, nevertheless, it became harmless in view of the fact that the court found that defendant failed to comply with the written contract, and that plaintiff and his assignors did comply with it on their part up to September 28th, when, owing to the breach of contract by defendant, they ceased work thereunder. As to the findings in this regard, no objection can be urged that it is not supported by the evidence, for the reason, as hereinbefore stated, the contract was before the trial court and it is not embodied in the record on appeal.

What is here said sufficiently disposes of the contention that defendant's motion for nonsuit should have been granted. There was no error in denying the motion.

A number of assignments of error are predicated upon rulings of the court made in excluding answers to questions put by defendant. The evidence sought to be elicited by these questions all pertained to damages alleged to have resulted from the contractors' failure to complete the work within the time specified in the contract. There is nothing in the record, however, from which it can be determined that the court erred in making such rulings.

Appellant contends that the amended complaint failed to state a cause of action by reason of the fact that it is not alleged that the amount sued for is "due and owing." In view of the fact that the complaint formally and in direct terms alleged nonpayment, no good purpose could be subserved by inserting words constituting a mere legal conclusion, and from the use of which, at most, and then only in the absence of a demurrer, the fact of nonpayment might be implied. (*Penrose v. Winter*, 135 Cal. 289, [67 Pac. 772].)

The record discloses no prejudicial error, and the judgment and order appealed from are affirmed.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 853. Second Appellate District.—May 20, 1910.]

T. J. MILES, Petitioner, v. JUSTICE'S COURT OF PASADENA TOWNSHIP, COUNTY OF LOS ANGELES, etc., Respondent.

CRIMINAL LAW—CHANGE OF VENUE IN JUSTICE'S COURT—CONSTRUCTION OF CODE.—Section 1431 of the Penal Code, relating to a change of venue in the justice's court in a criminal case, is not to be given the same effect as section 833 of the Code of Civil Procedure applicable to the civil actions therein.

ID.—AFFIDAVIT FOR BIAS AND PREJUDICE—JURISDICTION NOT OUSTED—POWER TO DETERMINE SUFFICIENCY OF REASONS—REMEDY BY APPEAL.—An affidavit for bias and prejudice does not *per se* oust the jurisdiction of the justice's court in a criminal case, but the court has power to determine the sufficiency of the reasons set forth, and for any error or abuse of discretion in passing thereon, the defendant has a speedy and adequate remedy by appeal.

ID.—OFFICE OF WRIT OF REVIEW.—The writ of review can only be granted where the inferior court has exceeded its jurisdiction and there is no appeal. The writ cannot be allowed to control discretion, nor to review mere errors in the exercise of jurisdiction.

ID.—JURISDICTION NOT EXCEEDED.—The justice of the peace did not exceed its jurisdiction, either in refusing to grant the motion for the change of venue or in proceeding to trial, after denying the same, or in determining the sufficiency of the evidence to support a conviction, or in charging the jury as to the law of the case, and any mere errors committed by the court in the exercise of its jurisdiction can be remedied only upon appeal.

APPLICATION for writ of review to justice's court of Pasadena Township, Los Angeles County.

The facts are stated in the opinion of the court.

Randall & Gaines, for Petitioner.

THE COURT.—It is alleged in the petitioner's affidavit that he was charged with the violation of an ordinance of Los Angeles county, claimed to have been committed in Los Nietos township in said county; that defendant was arrested and taken before a justice of the peace in and for Pasadena township, and his cause set down for trial; that petitioner filed an affidavit and motion for a change of venue on the

ground that the justice of the peace was biased and prejudiced and interested against him, and he could not have a fair and impartial trial before such justice; that expecting said motion to be granted he did not prepare for trial at the time set, which matter being brought to the attention of the justice he refused, notwithstanding the acquiescence on the part of the prosecuting officers, to continue the trial on account of the absence of the witnesses; that objection was made to proceeding further with the trial because it was claimed that the justice had lost jurisdiction by reason of the affidavit, which objection the justice overruled. It is alleged further that upon the trial he was convicted without the introduction of the evidence necessary in order to establish the offense, and that the court erred in giving certain instructions to the jury; that at the conclusion of the trial the jury found petitioner guilty; that from the judgment pronounced upon such verdict the petitioner appealed to the superior court of Los Angeles county; that upon the hearing of such appeal the judgment was by the superior court affirmed; and this writ is sought to review and annul the judgment of said justice.

The theory of petitioner is that the same effect should be given to section 1431 of the Penal Code as is given to section 833 of the Code of Civil Procedure, namely, that upon the filing of an affidavit showing bias and prejudice the justice must transfer the cause, and that he is without jurisdiction further to act. In the case of *Lowrey v. Hogue*, 85 Cal. 602, [24 Pac. 995], a distinction is drawn by our supreme court as between the two sections, and in which it is held that in a criminal action upon the facts stated in the affidavit the court is called upon to determine whether the reasons given support the conclusion, and for any abuse of discretion shown in relation thereto the defendant has a speedy and adequate remedy by an appeal to the superior court. In *Ex parte Wright*, 119 Cal. 401, [54 Pac. 639], a construction of section 1431 of the Penal Code is given, in which it is said the refusal of the justice to change the place of trial may have been error, and, if so, the prisoner has an ample remedy by appeal, but the justice did not exceed his jurisdiction in proceeding to trial after overruling the motion for a change of venue. This writ of review can only be granted when an inferior tribunal

exercising judicial functions has exceeded its jurisdiction and there is no appeal. From the action of the court, either in passing upon the motion for a change of venue or in determining the sufficiency of the evidence to warrant a conviction, or in charging the jury as to the law of the case, the justice was acting within his jurisdiction, and for errors committed in its exercise this writ will not lie.

Writ denied.

[Civ. No. 820. Second Appellate District.—May 23, 1910.]

SAMUEL BAUME, Appellant, v. M. E. MORSE, Respondent.

CONTRACT TO SELL LAND—STATUTE OF FRAUDS—ESSENTIALS TO SPECIFIC PERFORMANCE.—The essentials to an enforceable contract to sell real estate are that it, or a memorandum or note of its terms, shall be in writing, and that such writing shall declare with certainty the party who sells, the party who buys, the price to be paid, and a description of the property sold by which it can be known or identified.

ID.—INSUFFICIENT MEMORANDUM—WANT OF PRICE AND DESCRIPTION.—A mere dated receipt by defendant to plaintiff, for “forty dollars deposit on 5 acres of land in Compton. Good till the first of Nov. 1908,” is incapable of specific performance, because no price is named therein, and the description given is not sufficient to justify a court of equity in enforcing the conveyance of any property.

ID.—ABSENCE OF CAUSE OF ACTION FOR REVISION—CODE SECTION IN APPLICABLE.—Where no cause of action for revision was stated in the complaint, the provision of section 3452 of the Civil Code that “a contract may be first revised and then specifically enforced” is inapplicable.

ID.—MISSING TERMS OF CONTRACT NOT PROVABLE BY PAROL EVIDENCE.—The offer by plaintiff to supply the missing terms of the contract by parol evidence was properly denied by the court.

ID.—WRITTEN TERMS OF AGREEMENT MUST CONTROL.—When an agreement is reduced to writing, the writing is to be considered as containing all the terms of the contract; and no other evidence of the terms of the agreement will be admitted. No new terms can be introduced into the contract by parol.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Leon F. Moss, Judge.

The facts are stated in the opinion of the court.

Will D. Gould, for Appellant.

Willis & Robinson, for Respondent.

TAGGART, J.—Action to enforce specific performance of contract to convey real estate. The answer admitted an agreement to convey, but alleged that the purchase price was another and different sum from that alleged in the complaint, and also that the contract was oral. A nonsuit was granted at the close of plaintiff's case and judgment entered thereon; and plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The only instrument in writing which was pleaded or introduced in evidence to support plaintiff's cause of action was as follows:

“Los Angeles, Cal., Oct. 6, 1908.

“Received of Samuel Baume forty dollars deposit on 5 acres in Compton. Good till the first of Nov. 1908.

“\$40.

Mrs. M. E. MORSE.”

It is urged as grounds for a reversal of the judgment that the trial court erred in not accepting this writing as a sufficient note or memorandum in writing to satisfy the provisions of section 1973 of the Code of Civil Procedure, and to meet the requirements of subdivision 6 of section 3390 of the Civil Code, as a certain statement of the precise act to be done.

The essentials to an enforceable contract to sell real estate are, that it, or a memorandum or note of its terms, shall be in writing; that such writing shall declare with certainty the party who sells, the party who buys, the price to be paid, and a description of the property sold by which it can be known or identified. (*Breckinridge v. Crocker*, 78 Cal. 535, [21 Pac. 179]; *Craig v. Zelian*, 137 Cal. 106, [69 Pac. 853].) Measured by these essentials, we find the receipt for the \$40 deposit, here introduced, lacking in the two respects last men-

tioned. No purchase price is named therein, and the description given is not sufficiently definite to justify a court of equity in enforcing the conveyance of any property. The offer to supply the other alleged terms of the contract by parol was properly denied by the trial court. There was no cause of action for revision stated in the complaint, and section 3402 of the Civil Code, cited by appellant, has no application to this case. When an agreement is reduced to writing, the writing is to be considered as containing all the terms of the contract, and no other evidence of the terms of the agreement will be admitted. (Code Civ. Proc., sec. 1856.) No new terms can be introduced into the contract by parol. (*Germain Fruit Co. v. Armsby Co.*, 153 Cal. 585, [96 Pac. 319]; *Bradford Inv. Co. v. Joost*, 117 Cal. 204, [48 Pac. 1083]; *Board of Education v. Grant*, 118 Cal. 44, [50 Pac. 5].) The judgment of nonsuit was properly granted.

Judgment and order appealed from affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 780. Second Appellate District.—May 23, 1910.]

FAIRBANKS, MORSE & COMPANY, a Corporation, Respondent, v. C. E. GETCHELL, Appellant.

ATTACHMENT—AFFIDAVIT NOT SIGNED.—To justify the issuance of a writ of attachment, there must be received by the clerk an affidavit by or on behalf of the plaintiff; but it is not necessary that the affidavit be signed by the party making it.

ID.—IRREGULAR AFFIDAVIT—PERJURY—AUTHORITY OF NOTARY ESSENTIAL.—It is no defense to a prosecution for perjury, upon an affidavit for attachment, that the oath was taken or administered in an irregular manner; nevertheless, the document which purports to be sworn to is not an affidavit, unless the notary had authority at the time to administer the oath.

ID.—NOTARY'S AUTHORITY CONFINED TO COUNTY OF APPOINTMENT.—In the absence of statutory regulation providing otherwise, the rule is that a notary cannot act as such official outside of the county for which he is appointed. There is no provision in the codes of this

state which can be construed as authorizing a notary to administer an oath outside of his county; but their provisions are inconsistent with such authority.

ID.—NO AUTHORITY TO TAKE OATH OVER TELEPHONE OUTSIDE OF COUNTY.—Assuming, without deciding, that an oath may be administered and the obligations thereof assumed by communication had over the telephone, the validity of such act must be held to apply only where both notary and affiant are within the territorial limits for which the notary has been appointed and commissioned. No authority exists in a notary commissioned for one county to take the oath of a person in another county by telephone, however familiar his voice may be to the notary.

ID.—VOID AFFIDAVIT FOR ATTACHMENT TAKEN OUT OF COUNTY.—Where an affidavit for attachment to be used in Kern county was administered by a notary of that county to an affiant in Los Angeles county, the act of administering the oath to him was a nullity, and the purported affidavit upon which the attachment was issued was void and of no effect.

ID.—AMENDABILITY OF AFFIDAVIT—CHANGE IN CODE—IRREGULARITY—VOID AFFIDAVIT NOT AMENDABLE.—Prior to the amendment of 1909 to section 558 of the Code of Civil Procedure, no affidavit for attachment could be amended. But the changed law contemplates the existence of an irregular affidavit susceptible of amendment; and when the act of the notary in administering the oath was a nullity, and the purported affidavit is void, there is nothing to amend. There can be no irregularity in that which had no existence. In such case, the code amendment is inapplicable.

ID.—CONSTRUCTION OF CHANGED LAW—DISTINCTION BETWEEN MANNER OF PERFORMANCE AND PREREQUISITE ACT.—It is only where the manner of performing the act of taking the affidavit is irregular that amendability exists, under the changed law, to supply that which by reason of inadvertence or oversight was omitted from it. But the provision of the changed law cannot be construed as authorizing the filing of an affidavit in support of a writ of attachment before issued, in the absence of that which constitutes the substance of the act required as prerequisite to its issuance.

APPEAL from an order of the Superior Court of Kern County denying a motion to discharge an attachment. Paul W. Bennett, Judge.

The facts are stated in the opinion of the court.

George Flournoy, for Appellant.

W. W. Kaye, for Respondent.

SHAW, J.—This is an appeal from an order denying defendant's motion to discharge an attachment.

On May 6, 1910, an opinion was filed herein whereby the ruling of the trial court in denying defendant's motion to discharge an attachment was reversed. In that opinion the court overlooked section 558, Code of Civil Procedure, as it was amended in 1909 (Stats. 1909, p. 253), and in the absence of anything to the contrary being said by respondent, whose attorney it appears did not deem the case of sufficient importance to warrant him in filing points and authorities, or otherwise to offer any suggestions touching the points involved, it accepted appellant's contention based upon *Winters v. Pearson*, 72 Cal. 553, [14 Pac. 304], and *Tibbet v. Tom Sue et al.*, 122 Cal. 208, [54 Pac. 741], to the effect that an affidavit for attachment is not subject to amendment in this state. Our attention having been directed to the inadvertence, an order was made on May 19th whereby the judgment heretofore rendered was set aside and vacated and a rehearing ordered for the purpose of correcting the erroneous statement contained in the former opinion.

Defendant's motion for the discharge of the attachment was made upon the ground that the writ of attachment was improperly and irregularly issued. (Code Civ. Proc., sec. 556.) The irregularity is said to have consisted of the alleged fact that the writ of attachment was issued without the affidavit required by the provisions of section 538, Code of Civil Procedure.

As appears from the record, there was filed with the clerk on July 21, 1909, the date of the issuance of the writ of attachment, what purported to be an affidavit of plaintiff's agent. This document contained the title of the court and cause with the venue laid in the county of Kern, state of California, together with a statement of facts entitling plaintiff to the issuance of the writ. It was not subscribed by affiant, but had attached thereto the jurat of the notary as follows: "Sworn to before me this 21st day of July, 1909, W. W. Kaye, Notary Public." As shown by the affidavit and jurat, affiant appeared before the notary in Kern county and made oath to the affidavit. Kaye, however, when upon the witness-stand testified as follows: "I am the attorney for the plaintiff herein and am a notary public in and for the county of

Kern. That is my signature which appears to the jurat on the affidavit for attachment filed in this court on July 21, 1909. Mr. Chas. A. Meyer, whose name appears in the body of said affidavit, was not in Bakersfield on that date. He lives in Los Angeles and was in Los Angeles on that date. I called Mr. Meyer up in Los Angeles on that date over the telephone and he made oath to the matters contained in the affidavit. He related the facts contained in the affidavit and under oath stated to me that they were true. I am well acquainted with Mr. Meyer and recognized his voice over the telephone."

Appellant contends that the affidavit was made in Los Angeles county, and that W. W. Kaye, the notary, having been appointed in and for the county of Kern, state of California, had no authority to act officially as such notary in the county of Los Angeles.

To justify the issuance of the writ there must be received by the clerk an affidavit by or on behalf of the plaintiff. It is not necessary that the affidavit be signed by the party making it. (*Ede v. Johnson*, 15 Cal. 53; *Pope v. Kirchner*, 77 Cal. 152, [19 Pac. 264].) Neither is it any defense to a prosecution for perjury thereon that the oath was taken or administered in an irregular manner (Pen. Code, sec. 121); nevertheless, the document which purports to be sworn to is not an affidavit unless the person before whom his assent to the solemn obligation is assumed had authority at the time to administer the oath. (*People v. Cohen*, 118 Cal. 74, [50 Pac. 20].) In the absence of statutory regulation providing therefor, the general rule is that a notary cannot act as such official outside of the county for which he is appointed. (*In re House Bill No. 166*, 9 Colo. 628, [21 Pac. 473]; 29 Cyc. 1090; *Byrd v. Cochran*, 39 Neb. 109, [58 N. W. 127].) We are unable to find any provision in the codes of this state which could be construed as authorizing a notary of one county to administer an oath in a county other than that for which he is appointed. Section 791 of the Political Code provides that the governor may appoint such number of notaries public for the several counties as he shall deem necessary for the public convenience, but limits the number which he may appoint in cities and counties of the first class to not exceeding eighty. If notaries of other counties could

maintain offices and act officially in the city and county of San Francisco, the provision thus limiting such number would be nullified. To qualify one for such appointment he must have resided in the county for which his appointment is made for six months (sec. 792).

Furthermore, he is required to keep an official seal upon which, among other things, must be engraved the name of the county for which he is commissioned. (Pol. Code, subd. 7, sec. 794.) All these provisions are inconsistent with the view that the legislature intended the jurisdiction of a notary to be coextensive with the state.

As appears from the record, the oath was administered by communication had between the notary and affiant over the telephone, and appellant contends that the act was void and of no effect for this reason. Such contention finds direct support in the case of *Sullivan v. First Nat. Bank*, 37 Tex. Civ. App. 228, [83 S. W. 421]. According to our view, however, it is unnecessary to determine this point. Assuming, but not deciding, that an oath may be administered and the obligations thereof assumed by communication had over the telephone, the validity of such act must be held to apply to those cases only where both notary and affiant are within the territorial limits for which the notary has been appointed and commissioned.

At the time he made the affidavit and assented to the obligations of the oath, Meyer, the affiant, was in the county of Los Angeles. His act signifying his assent to the obligation must be deemed to have been had and done in Los Angeles county, where he then was. If untrue, it could not be claimed that he committed an act in swearing to a false affidavit in the county of Kern upon which a prosecution for perjury could be predicated, for the reason that it clearly appears he was not in Kern county when the act was committed. The oath was administered by a notary commissioned for Kern county to an affiant conceded to have been at the time in Los Angeles county, and the notary being vested with no authority to administer an oath in Los Angeles county, it necessarily follows that the act was a nullity, and the purported affidavit upon which the attachment was issued was void and of no effect.

At the hearing of the motion there was presented and filed what is termed an amended affidavit, which is in proper form and sufficient in substance to justify the issuance of the writ of attachment.

Section 558, Code of Civil Procedure, as amended in 1909 (Stats. 1909, p. 253), provides that, notwithstanding the fact that the writ of attachment is improperly or irregularly issued, nevertheless, it shall not be discharged "if at or before the hearing of such application the . . . affidavit . . . upon which such attachment was based shall be amended and made to conform to the provisions of this chapter." Prior to the enactment of this amendment the affidavit for attachment could not be made the subject of an amendment under the laws of this state. (*Winters v. Pearson*, 72 Cal. 553, [14 Pac. 304]; *Tibbet v. Tom Sue et al.*, 122 Cal. 208, [54 Pac. 741].) Inasmuch, however, as the act of Kaye in administering the oath was a nullity and the purported affidavit void, it follows there was nothing to amend. The authorized amendment of the affiant contemplates the existence of an affidavit. There could be no irregularity in that which had no existence. In the case of *Cobbossee Nat. Bank v. Rich*, 81 Me. 164, [16 Atl. 506], the court, in discussing the distinction between that which is void and that which is irregular, says: "Generally speaking, it is the difference between substance and form, between void and voidable, or between void action and imperfect action. Error or nullity goes to the foundations and discovers that the proceedings have nothing to stand upon; while irregularity denotes that the court was acting within its jurisdiction, but failed to consummate its work in all respects according to the required forms. The one applies to matters which are contrary to law, the other to matters which are contrary to the practice authorized by the law. One relates more to the act, and the other more to the manner of it." In this case it is not the manner of performing the act, but the total absence of the act the performance of which was a necessary prerequisite to the issuance of the writ. Under this proviso the attaching party may by amendment supply that which, by reason of inadvertence or oversight, was omitted from the affidavit, but the provision cannot be construed as authorizing the filing of an affidavit in support of a writ theretofore issued in the absence of that which consti-

tutes the substance of the act required as a prerequisite to the issuance thereof.

We think the court erred in its ruling, and the order denying defendant's motion to discharge the attachment is, therefore, reversed, with direction to the lower court that it make its order granting the same.

Allen, P. J., and Taggart, J., concurred.

[Civ. No. 698. Third Appellate District.—May 23, 1910.]

OSCAR J. BROADDUS, Administrator, etc., et al., Appellants, v. MELVIN MONROE JAMES et al., Respondents.

ACTION TO SET ASIDE DEED BY AGED WIDOW—ALLEGED INCAPACITY—WANT OF CONSIDERATION OR INDEPENDENT ADVICE—TRUST RELATION—SUPPORT OF FINDINGS.—In an action to set aside a deed made by an aged widow to her surviving daughter to the exclusion of children of a deceased daughter for alleged incapacity, want of consideration or independent advice, and breach of a trust relation, where the court found against all of the allegations of the complaint, and in favor of the grantee, it is apparent that if the evidence is sufficient to sustain the findings that the grantor fully understood the nature of the transaction, and that the conveyance was the effect of her untrammelled and voluntary act, the questions as to consideration and independent advice become unimportant.

ID.—RIGHT OF OWNER TO DISPOSE OF PROPERTY.—Every owner has an incontrovertible right, in the absence of fraud, to dispose of his own property according to his volition.

ID.—CONFLICTING EVIDENCE AS TO WANT OF CAPACITY OF GRANTOR.—Where the evidence for the plaintiffs addressed to the alleged want of capacity of the grantor was in substantial conflict with that for the respondents, which supports the findings made that the grantor thoroughly understood the nature and consequences of her deed, the findings as made on that question cannot be disturbed by this court.

ID.—SUPPORT OF FINDING AS TO VOLUNTARY DEED.—The finding is fully supported as to the voluntary character of the transfer by deed by the widow to her daughter. The testimony of the defendants and of three other witnesses who were present at the execution of the deed justifies the conclusion of the court that the grantor was free

from undue or any improper influence of the grantee or any other person.

ID.—AFFECTION BETWEEN MOTHER AND DAUGHTER—MINISTRATION OF DAUGHTER—DECLARATION OF GRANTOR.—The evident affection that existed between the mother and daughter, the kindly and continued ministration of the latter to the comfort and happiness of the former, and the declaration of the grantor as to her reason for making the deed that "Mary Ann was good and kind to her, and she didn't know how she could have got along without her, and she wanted her to have what property she had; she had deserved it all," all tended to rebut any unfavorable inference against the grantee.

ID.—REASONABLENESS OF DEED.—Upon the abundantly supported theory of the uniform kindness of the daughter toward the mother, and in view of the fact that it had continued through many years, and that she was the only living child, the conveyance is easily explicable, and seems entirely reasonable.

ID.—PRESUMPTION FROM RELATION BETWEEN PARENT AND CHILD—EVIDENCE NEGATING UNDUE INFLUENCE.—The showing made by the evidence was sufficient to overcome any possible presumption of undue influence growing out of any confidential relation between the parties as aged parent and child. There was no other relation between them than that of care of the child for the parent. The daughter had no power of attorney and transacted no business for the mother.

ID.—RELATION OF PARENT AND CHILD NOT INVALIDATING DEED OF PARENT.—The mere relation of parent and child is not sufficient to invalidate a deed from the parent to the child. It is merely a circumstance, inviting careful consideration of the transaction; but before it can justify the inference of undue influence, there must be superadded imposition, fraud, importunity, or something of that nature. Cases arising between an aged parent and child can turn only upon the exercise of actual undue influence, and not upon any presumption of invalidity. A gift from a parent to a child certainly cannot be presumed invalid.

ID.—INDEPENDENT ADVICE AND CONSIDERATION—QUESTIONS FOR TRIAL COURT.—Though the questions of independent advice and consideration are not essential to the validity of the transaction, when the deed was fully understood and voluntary, yet they are important elements to be considered by the trial court in determining the status of the property. Though the notary summoned by her was not an independent adviser in the legal sense, yet he first took her free statement of what she wished to do with the property, and when he prepared the deed accordingly, fully made her acquainted with its contents before she executed it. The evidence as to con-

sideration, though meager, is sufficient to support the finding of the court on that question.

ID.—SERVICES RENDERED BY DAUGHTER TO PARENT—PRESUMPTION OF GRATUITY NOT CONCLUSIVE—BURDEN OF PROOF.—Though services rendered by a child to the parent are presumed to be gratuitous, yet such presumption is not conclusive. The burden is on the party rendering the services to overcome such presumption, and the proof is sufficient to overcome it and support the finding of consideration for the deed.

ID.—DECLARATIONS OF TESTATOR SHOWING VALUE OF SERVICES.—The declaration of the testator showing the value of the services rendered to her by her daughter, and that she deserved the whole of the property which she proposed to deed to her, would undoubtedly be admissible against her if she were alive and contesting the deed, and they were equally admissible against her representatives, and in favor of the representatives of the deceased grantee, as being the best evidence obtainable on the question of consideration. Its weight was for the trial court.

APPEAL from a judgment of the Superior Court of Mendocino County, and from an order denying a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

McNab & Hirsch, and D. W. Burchard, for Appellants.

Mannon & Mannon, for Respondents.

BURNETT, J.—The facts may be stated substantially in the language of appellants, as follows: Mary F. Broaddus died intestate in October, 1906. At the time of her death she had been a widow for more than thirty years. Two children, both daughters, were born to her during coverture. One of these, Jane, died in 1885 and the other, Mary Ann, in 1906. The sons and only heirs of the daughter Mary Ann are defendants and respondents and the descendants and heirs of the other daughter are plaintiffs and appellants herein. Prior to the death of the daughter, Jane, the mother had broken up housekeeping, divided her household effects between the two families, spent part of her time with one and part of the time with the other daughter until Jane's death, when she went to live with Mary Ann and remained there until the latter's death, as aforesaid, in 1906. On Octo-

ber 27, 1904, and for a long time prior thereto, the said Mary F. Broaddus was the owner and seised in fee of a certain tract of land in Mendocino county of the value of about \$7,000, and it is claimed that at the time of her death she was the equitable owner and entitled to the possession of the same, and that plaintiffs, by right of inheritance, succeeded to an undivided one-half thereof.

On said 27th of October, the said Mary F. Broaddus made a deed of this property to her said daughter, Mary Ann James, thereby divesting herself of all her possessions except a pension which expired at her death.

As stated by appellants: "The purpose of this action is to set aside the deed so made, on the grounds that Mary F. Broaddus, at the date thereof and for a long time prior thereto, was of unsound mind, incapable of transacting business, of understanding or appreciating any business or of managing her property, and was insane, and on the further ground that said transfer was improvident, without sufficient or any consideration and was a mere gift and was made without independent or any counsel or advice of any character whatever, to one occupying a position of trust and extreme confidence."

The judgment was in favor of defendants, and from this and the order denying a motion for a new trial the appeal was taken.

The court found: "That the deed was, on the twenty-seventh day of October, 1904, signed, executed, acknowledged and delivered by the said Mary F. Broaddus to the said Mary A. James freely and voluntarily and with full knowledge and understanding on the part of the said Mary F. Broaddus of the contents of said instrument, of what she was doing and of its results to herself and all her relatives and of its nature, operation and legal effect; that said Mary F. Broaddus received a good and valuable consideration from the said Mary A. James for the execution of said deed and for the lands and premises conveyed thereby." There is also a finding that no undue influence was exerted, that no advantage was taken of the grantor, Mary F. Broaddus, and that she "had full, free and independent advice and information concerning the execution of said deed and of its effects upon herself, her property and all her relatives."

Appellants rely for a reversal of the judgment principally upon the ground that the evidence is insufficient as a matter of law to support these various findings of the trial court.

It must be apparent, however, that if the evidence is sufficient to support the conclusion that the grantor fully understood the nature of the transaction and that the conveyance was the effect of her untrammelled and voluntary act, the questions as to consideration and independent advice become unimportant. This follows from the incontrovertible right of everyone, in the absence of fraud, to dispose of his own property according to his volition. The first inquiry suggested, then, is, Can a rational conclusion be drawn from the evidence that the grantor had sufficient understanding to appreciate the nature of the transaction and to realize the significance of the conveyance?

Appellants dwell with persuasive skill upon the mental and physical infirmities of the grantor detailed by various witnesses, and it is confidently asserted that she was afflicted with senile dementia to that extent that she could not comprehend the nature or consequences of the deed in question. Among other circumstances related, attention is called to the following: For twenty years prior to the execution of the deed she had been stone blind. She went to bed one night able to see and awoke in the morning with her eyesight gone forever. Thereafter she rapidly declined, both mentally and physically, and she manifested less and less interest in things about her. She was a cripple and had walked with crutches and cane for nearly twenty years or more prior to that date. She was addicted to the use of tobacco from early years, she was tremulous with extreme age and so emaciated that she resembled a mummy. Her hearing had become bad progressively, and when the notary attempted to read portions of the deed to her he had to sit down alongside her and talk in a loud voice directly in her ear. Physically she was so weak and decrepit that for ten years or more she could not move without assistance, and had to be clothed and fed by her daughter. Conversation in her later years had to be carried on through Mary Ann and at last she took no notice of what went on around her. In later years her relatives seemed lost to her memory, although they had been before the objects of her affectionate regard. Whenever she attempted to speak

during these later years she could not carry on a connected conversation, her sentences would halt midway, and it was impossible to secure rational or intelligent answers. In later years, she suffered a sunstroke, after which she more rapidly declined. It seemed as if she was merely being kept alive to celebrate her one hundredth birthday. Witnesses also testified that, in their opinion, at the time of the execution of the deed, she was irrational and of unsound mind.

But when we turn to the witnesses for respondents we find an entirely different story. It is not claimed, indeed, that she had survived unscathed the ravages of time, but, viewing the testimony as the law requires of us, it is impossible to avoid the conclusion that the court below was justified in finding that she thoroughly understood the nature and consequences of her act. Mrs. Parker Hall testified: "I had known Grandma Broaddus at that time about twenty-five years, I guess. I can't exactly tell how often I had seen her during that twenty-five years, but as often as convenient would visit. When she would be sick I would always go and see her, visit her. I was a friend of Grandma Broaddus, and visited at her house as I visited at the houses of other friends in Willits. In my opinion Grandma Broaddus on the twenty-seventh day of October, 1904, was sane. At all times when I talked with Grandma Broaddus I had no difficulty in talking to her. Her answers to my questions were always intelligent." Nine other disinterested and four interested witnesses testified to the same effect. They related conversations with her and gave reasons for their opinion that she was entirely of sound mind. One of these disinterested witnesses who had known Mrs. Broaddus since 1864 and had visited her frequently declared that she "never met the old lady when she could detect anything wrong with her mind." As to the circumstances immediately surrounding the execution of the deed, the three subscribing witnesses testified that it was fully explained to her at the time it was executed. The conclusion from their testimony is irresistible that she understood the nature and effect of the deed. Furthermore, as indicative of her knowledge of the significance of said transaction, there is the testimony of three witnesses to her subsequent declaration that the grantee owned the property.

It may be admitted that the case is a peculiar one. The great age of the grantor renders it somewhat unprecedented. No case has been cited and probably none can be found where, as here, the action was to set aside a deed executed by a person lacking only a few days of being one hundred years of age. Still, it cannot be said that the testimony of the witnesses as to her mental condition is inherently improbable. This court cannot say, in the face of the evidence to the contrary, that her extreme age had so impaired her mental faculties as to render her incapable of conveying her property. If allusion were to be made to common knowledge or to historical examples, we would find many illustrations in extreme old age of the truth of Cicero's statement that "occasionally the mind seems to stand out of reach of the body's decay." The instances are, of course, rare, but at least one case in an adjoining county is familiar to many where an individual still lives, having passed the century milestone, whose acquaintances would not hesitate to pronounce of sufficient mentality to execute a valid conveyance. Mitchnikoff, in his work on "The Prolongation of Life," declares that women live to much greater ages than men, but yet, among the former, it is the rarest chance to find a centenarian. He mentions, however, the case of one Mme. Robineau, with whom he became acquainted, who lived in a suburb of Paris and had reached the age of one hundred and six. The physical condition of this woman, he declares, showed extreme decay, but notwithstanding her physical weakness, Mme. Robineau "retained her intelligence fully, her mind remained delicate and refined, and the goodness of her heart was touching. Her conversation was intelligent, connected and logical." He proceeds to state that "at the age of one hundred and six her intelligence suddenly became weak. She lost her memory almost completely and sometimes wandered." He concludes with the assertion that "The facts that I have brought together justify the conclusion that human beings who reach extreme old age may preserve their mental qualities notwithstanding serious physical decay." In this connection he calls attention to the fact that "philosophers such as Plato, poets such as Goethe and Victor Hugo, artists such as Michael Angelo, Titian and Franz Hals produced some of

their most important works when they had passed the age of seventy-five."

The position of respondents in relation to the voluntary character of the transfer is equally impregnable. The testimony of the defendants and of the three witnesses, who were present at the execution of the deed, justifies the conclusion of the court that the grantor was free from undue or any improper influence of the grantee or any other person. The evident affection that existed between mother and daughter, the kindly and continued ministration of the latter to the comfort and happiness of the former, and the declaration of the grantor as to her reason for making the deed are all significant circumstances tending to rebut any unfavorable inference against the grantee. As clearly indicative that she was following her unaided inclination and volition, we find, according to the testimony, the old lady declaring: "Mary Ann was good and kind to her and she didn't know how she could have got along without her, and she said she wanted her to have what property she had. She had deserved it all." Upon the theory of the uniform kindness of said Mary Ann to her mother, which finds abundant support, and in view of the fact that her attentions had continued for so many years, and that she was the only living child, the conveyance is easily explicable, and seems entirely reasonable. While her considerate and tender care of her mother was no more than required by filial duty, yet the great infirmities of the aged woman, while rendering the duty no less imperious, imposed an onerous burden and responsibility, and the acceptance and acquittance of this duty with cheerful and persistent zeal deserve unstinted commendation and generous reward. This seems to have been recognized and appreciated by Mrs. Broadus.

It is, moreover, the contention of appellants that the evidence disclosed a confidential relation between the parties to the deed of such a nature that the presumption would follow that the deed was the result of the undue influence of the grantee, which could not be overcome except by her testimony. As the grantee was not living at the time of the trial, this view would manifestly require a reversal of the lower court's finding. But conceding, for the sake of the argument,

the existence of said relation and presumption, they cannot have the operation and effect claimed by appellants.

In *Hemenway v. Abbott*, 8 Cal. App. 450, [97 Pac. 190], a somewhat similar contention was made, but it is therein held that it was not necessary for the grantee to take the stand, the court saying: "It would doubtless have been more satisfactory had she made a full explanation of her relations with Proctor, but it cannot be said, as matter of law, that her failure to testify destroyed the probative force of the evidence submitted in the case in her behalf."

A fairer statement, however, of plaintiffs' position probably is that in view of the said relation and presumption the evidence, in the absence of any testimony from the grantee, is insufficient to show that no undue influence was exerted. However, we feel satisfied that the showing was sufficient to overcome any adverse presumption that may have existed in the premises. Again, the court was justified in the view that no such presumption should be indulged. As pointed out by respondents: "Mrs. James did not transact any business for her mother. She held no power of attorney and did not manage the property. According to the testimony of Albert James, the old ladies gave him joint direction concerning the leasing of the ranch," it being conceded that Mrs. James owned a part of it in her own right. The mere relation of parent and child is not sufficient to invalidate a deed from the former to the latter. It is a circumstance, of course, inviting careful consideration to the transaction, but before it can justify the inference of undue influence there must be added, imposition, fraud, importunity or something of that kind. It is so expressed in Pomeroy's Equity Jurisprudence, 962, and *Mackall v. Mackall*, 135 U. S. 167, [10 Sup. Ct. Rep. 705], cited by respondents. In the former it is said: "Where the positions of the two parties are reversed where the parent is aged, infirm, or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority, conveyances conveying benefits upon the child may be set aside. Cases of this kind plainly turn upon the exercise of actual undue influence and not upon any presumption of invalidity. A gift from parent to child is certainly not presumed to be invalid."

In the Mackall case, *supra*, it is said by the court, through Mr. Justice Brewer, that: "Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under these circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress or something of that nature must appear; otherwise, that disposition of property which accords with the natural inclinations of the human heart must be sustained."

The cases cited by appellants in which the presumption is said to exist involve a different state of facts from what we are now considering.

The character of *Brown v. Burbank*, 64 Cal. 99, [27 Pac. 940], is clearly shown by this statement in the opinion: "The plaintiff, while still an inexperienced girl, still under the care and control of her grandparents, still subject to the influence acquired by them in the double relation of parent and guardian of her person and estate, accustomed to consult their wishes and obey their commands, ignorant of her rights, purposely misled and kept in ignorance by those to whom she naturally looked for the protection of her interests, without the aid of legal advice or time for reflection, made a conveyance of her whole estate without any valuable consideration to one standing *in loco parentis*." It is well said, "that a deed obtained under such circumstances cannot be permitted to stand is one of the clearest of propositions."

While, in *Brison v. Brison*, 75 Cal. 525, [7 Am. St. Rep. 189, 17 Pac. 689], it is declared that the relation between husband and wife is confidential, it was held that the plaintiff was induced to make the deed by the confidence which he had in his wife, and that the betrayal of such confidence was constructively fraudulent. For this reason, and also upon the ground that there was actual fraud, the transaction was construed as creating a trust. This case is reviewed in *Tillaux v. Tillaux*, 115 Cal. 673, [47 Pac. 691], wherein it is said: "By the foregoing authorities and others not here collated, the principle is clearly declared that the marriage relation does not, *ipso facto*, raise the presumption that a deed of conveyance from the husband to the wife has been the re-

sult of undue influence; but such deed, *prima facie*, conveys to the wife whatever, according to rules of conveyancing, its terms embrace. We have discussed the subject at some length, because an expression or two in one or two former opinions give some faint color, scarcely visible, to a different doctrine. Appellant contends that there are facts at bar which, viewed in the light of the marriage relation, are sufficient to make the deed in question invalid; and the case of *Brison v. Brison*, 90 Cal. 323, [27 Pac. 186], and also 75 Cal. 525, [7 Am. St. Rep. 189, 17 Pac. 689], is cited in support of the contention. The facts in that case were very peculiar and presented an instance of a wife violating an express promise made by her to a husband, upon which he had the right to implicitly rely, not only on account of the legal confidential relation between them, but also on account of the actual confidence which he had in her, as the relation between them had always been most affectionate and confiding." It is apparent, of course, that the same result would follow in any case where actual confidence existed and there was a wrongful violation of that confidence.

The decision in *Ross v. Conway*, 92 Cal. 632, [28 Pac. 785], rested upon evidence that there was actual undue influence exercised by the spiritual adviser of one who was of weak mind and in a dying condition. It is undoubtedly true, as therein declared, "that the influence which the spiritual adviser of one who is about to die has over such person is one of the most powerful that can be exercised upon the human mind, especially if such mind is impaired by physical weakness, is so consonant with human experience as to need no more than its statement; and in any transaction between them wherein the adviser receives any advantage, a court of equity will not enter into an investigation of the extent to which such influence has been exercised."

In *O'Dell v. Moss*, 130 Cal. 352, [62 Pac. 555], it is held that the relationship of brother and sister is not of itself fiduciary, "but it is a material circumstance in determining whether, as a matter of fact, a fiduciary relation existed between them, which is more easily superinduced by reason of the blood relationship; and where it appears that special trust and confidence is reposed by one of them in the other, the one who occupies the superior position has the duties and re-

sponsibilities of a trustee, with the attendant consequences of the trust relation.”

The case of *De Arellanes v. Arellanes*, 151 Cal. 443, [90 Pac. 1059], was an action to set aside a deed from a mother to her son, and it was held that the transfer was valid where it was made “freely and voluntarily in the execution of a purpose conceived by her to so dispose of the property, without the exercise of any fraud on the part of the son, and with full understanding on her part of all the facts and the effect of such a transfer.” Therein the rule announced in *Soberanes v. Soberanes*, 97 Cal. 140, [31 Pac. 910], is quoted with approval, wherein it is said: “When the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily, and with full knowledge of all the facts and with perfect understanding of the effect of the transfer.” Granting that this is a correct exposition of the rule, the burden, as we have already seen, was sufficiently met by respondents.

In *Nobles v. Hutton*, 7 Cal. App. 14, [93 Pac. 289], the judgment of the lower court was affirmed, which was based upon findings and sufficient evidence to the effect that “when the deed was executed, the plaintiff was old, infirm, of failing memory and of unsound mind, and by reason thereof incapacitated from attending to business and defendant took advantage of such incapacity and procured her to sign and acknowledge the deed without consideration; that the plaintiff was without independent advice, and that defendant by taking advantage of plaintiff’s mental weakness, and by the use of undue influence arising out of the relationship between them of mother and son and of principal and agent induced plaintiff to execute the deed.”

Aside from the foregoing, appellants are mistaken, we think, in the view they take of the elements of independent advice and of the consideration for the transfer.

They are not essential, as we have seen, to the validity of the transaction, but they are important elements to be regarded by the trial court. Under some circumstances, they might be decisive of the controversy, but here they were simply an important part of the evidence the weight and effect

of which were committed to the judgment and conscience of the trial judge in the determination of the status of the property.

While there is no direct evidence that the notary who prepared the deed *advised* the grantor, as that term is generally understood, yet it does appear that she told the witness, Mrs. Cook, that she wanted to make a deed of her property to her daughter, and asked the witness to see Mr. Baechtel and have him come to the house. It is true that Mrs. James saw the notary first and informed him of her mother's desire. Mr. Baechtel, in pursuance of the request, visited Mrs. Broaddus to ascertain what she wanted, and she then told him that she wanted to deed the property to her daughter. He then went to his office, prepared the deed as requested and the same evening returned with it to Mrs. Broaddus. He informed Mrs. James that two witnesses would be required as her mother was blind. They were summoned and Mr. Baechtel read the deed over to Mrs. Broaddus, explained it and satisfied himself that she thoroughly understood it. Among other questions, he asked her if she understood that she was deeding her property to her daughter, and she said she did. Not very much was said, but, according to the witnesses, the notary was careful in the performance of his duty, and it seems difficult to understand how anything more could have been expected of him. The declarations of the grantor show that she needed no particular advice or information in the premises, and for the notary to have undertaken to tell her what she already understood about the effect of the deed would have been entirely gratuitous and rather impertinent. The circumstance as to independent advice is to be regarded as bearing upon the question whether the deed is the voluntary act of the grantor, and it is not so significant, as contended by appellants, that a deed made "without the benefit of full, free and independent advice and counsel from a competent lawyer of her own selection will not be allowed to stand."

It is deemed unnecessary to review the cases cited as to this point, but the rule in this state does not require, as declared in the case of *Soberanes v. Soberanes*, 97 Cal. 146, [30 Pac. 912], that "the donor acted upon independent advice in transactions between parent and child, when it appears that

the gift was made freely, voluntarily and with full understanding of all the facts and the effect of the transfer."

As to the consideration, while the evidence is somewhat meager, we cannot say it is insufficient to support the finding. It is conceded by respondents that if the services were rendered by Mrs. James without expectation of reward or agreement therefor, they must be considered as gratuitous, and, in the absence of evidence, such would be the presumption, but it is insisted—and to this we assent—that the presumption is not conclusive, but may be and has been rebutted "by showing circumstances which will support the implication that the services were to be paid for." The rule is so stated in the American and English Encyclopedia of Law, volume 18, page 1085, with citation of authorities. It is added that "The burden is, of course, on the person rendering the services to overcome the presumption which the law raises that such services were rendered gratuitously." Among the cases so holding is *Finch v. Green*, 225 Ill. 304, [80 N. E. 318], where a son and his wife cared for his aged father for over twenty years, and, in discussing the question of consideration, the supreme court of Illinois, after stating the general rule that "there can be a recovery only by proving the making of an express contract or circumstances from which a reasonable inference would arise that such a contract was in fact made," the court further says: "The evidence shows that David Finch recognized to the fullest extent a moral obligation on his part to pay for the valuable and unusual personal services rendered to him; but there is no evidence that prior to the making of the will there was an express contract to pay for them. . . . The evidence, however, justifies an inference of an express contract between the parties when the will was made, or certainly at the time of the execution of the deed. The deed was executed in the presence of appellant and his wife, and it is clear that it was made in consideration of the services rendered and to be rendered, and the care and trouble which the grantor had caused to his son and wife. The services were of such a nature that they could scarcely be measured in money, and it was entirely competent for David Finch to place such a value upon them as he saw fit."

The declarations of the grantor as to her reasons for executing the deed would undoubtedly be admissible against her

if she were alive and contesting the deed, and they are equally admissible against her representatives. (Code Civ. Proc., sec. 1853; *Donnelly v. Rees*, 141 Cal. 56, [75 Pac. 433]; *Stoddard v. Newhall*, 1 Cal. App. 111, [81 Pac. 666].)

Such testimony may not be altogether satisfactory, but it was the best that could be obtained, since the grantor and grantee were dead, and its weight was for the trial court.

We have considered all the points made in the full and able briefs of appellants, but we can see no reason to interfere with the conclusion of the court below, and the judgment and order denying the motion for a new trial are affirmed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 699. Third Appellate District.—May 26, 1910.]

OSCAR J. BROADDUS, Administrator, etc., et al., Respondents, v. MELVIN MONROE JAMES et al., Appellants.

NEW TRIAL—REFUSAL TO DISMISS PROCEEDINGS—BILL OF EXCEPTIONS—AMENDMENTS ACCEPTED—FAILURE TO SERVE SETTLED BILL.—The court properly refused to dismiss the proceedings on motion for a new trial, merely for failure to serve the adverse party with the settled bill of exceptions, where it appears that, after service of the proposed bill and amendments thereto, the amendments were expressly accepted by the moving party. In such case, no notice of the settlement of the bill is required, and the settled bill is only required to be filed, without service thereof upon the adverse party.

ID.—REQUIREMENT OF SERVICE OF SETTLED BILL—CONTROVERTED AMENDMENTS—NOTICE OF SETTLEMENT.—The requirement of service of a settled bill of exceptions is limited by the statute to the case where the proposed bill and proposed amendments are controverted. In such case, notice of the hearing for the settlement of the bill is essential; and when the bill is settled, it must be engrossed by the moving party, and presented by him for proper certification within five days, after which the certified bill must be served upon the adverse party.

ID.—FOLLOWING STATUTE IN PARTICULAR CASE.—While it is true that an appellant must follow closely the provisions of the statute, in

order to have his appeal perfected, it is equally true that he is not required to do more than the statute demands in the particular case.

APPEAL from an order of the Superior Court of Mendocino County, refusing to dismiss proceedings for a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

McNab & Hirsch, and D. W. Burchard, for Appellants.

Mannon & Mannon, for Respondents.

BURNETT, J.—The appeal is from an order made after judgment denying a motion to dismiss the proceedings for a new trial. The only ground for the motion was that the bill of exceptions, after having been certified by the trial judge, was not served upon defendants in the action, who are appellants herein.

After plaintiffs served their proposed bill, the defendants in due time proposed their amendments to the same. These were all accepted by said plaintiffs, whose counsel so informed one of the attorneys for defendants on the twenty-ninth day of July, 1908. On the same day plaintiffs presented to the trial judge the proposed bill and the amendments, and the judge thereupon, in the absence of, and without notice to, the defendants or their counsel, certified the bill so presented. The certified bill was filed but not served upon the defendants or their counsel.

We think the motion was properly denied. Section 650 of the Code of Civil Procedure, under which the proceeding was taken, as it read at the time of the said settlement of the bill, did not require, where all the amendments proposed are allowed, that the certified bill should be served upon the adverse party. As pointed out by plaintiffs: "Two proceedings are evidently contemplated by said section 650—one in which the adverse party proposes amendments which are contested, and subsequently settled on notice to the parties designating the time for settlement; and another in which there is no controversy in regard to amendments, but either no amendments are proposed, or if any such are proposed, they are

adopted by the person seeking the settlement of the bill, and the bill is filed with the clerk." In regard to the first contingency, the section provides how the matter may be brought to a hearing, and then directs that "At the time designated the judge must settle the bill. The bill must thereupon be engrossed and presented to the judge to be certified by the party presenting it, within ten days, and upon being certified must, within five days thereafter, be served upon the adverse party." The statute then provides for the case where there is no contest in reference to the bill, as follows: "If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee for settlement, without notice to the adverse party. . . . When settled, the bill must be signed by the judge or referee, with his certificate to the effect that the same is allowed, and must then be filed with the clerk." It is thus to be seen that in a case like the one before us no service of the bill as settled is required.

While it is true, as contended by defendants, that an appellant must follow closely the provisions of the statute in order to have his appeal perfected, it is equally true that he is not required to do more than the statute demands.

The order appealed from is affirmed.

Hart, J., and Chipman, P. J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 21, 1910.

[Civ. No. 686. Third Appellate District.—May 26, 1910.]

EDWARD J. CAMPBELL, Appellant, v. CHARLES GRENNAN and GERTRUDE C. GRENNAN, Respondents.

PURCHASE OF RECORD TITLE—GENERAL RULE.—As a general rule, where the vendor of land is in the apparent possession thereof, a purchaser of it, finding the title of record in the vendor, is put upon no further inquiry.

ID.—EXCEPTION—KNOWLEDGE OF POSITION OF HOUSES—PURCHASE SUBJECT TO OCCUPATION BY DEFENDANTS' HOUSE.—Such general rule does not apply where the purchaser knew the land for many years, and that defendants' house stood eighteen inches over the line, and that the house of the common predecessor of plaintiff and defendants stood partly over on defendants' land. The moral and legal duty was cast upon plaintiff, as purchaser, to inquire as to these patent and obtrusive facts; and his purchase of the land on which defendants' house stood was with notice thereof, and subject thereto.

ID.—AGREED OCCUPATION—DIVISION LINE—FACTS PUTTING PURCHASER UPON INQUIRY.—Where the owner of the whole lot sold the east half to defendants, and they agreed upon a division line, and defendants' house abutted thereon, and the owner's house in the rear standing on the west half stood partly on the east half, and so remained till her death, and the subsequent purchaser of the west half knew all of the facts, other than the agreement, they were of such a character as to excite the suspicion of a prudent man dealing with the property that some agreement not disclosed by the record was made by the parties owning the lot.

ID.—INEQUITY OF EJECTMENT—SERIOUS INJURY TO DEFENDANT'S HOUSE. It would be manifestly unjust and inequitable, in view of plaintiff's knowledge of the open and notorious and exclusive occupation of the land on which defendants' house stood for five years, to eject them from such occupation, to the serious injury of defendants' house.

ID.—PRESUMPTION OF PURCHASE IN VIEW OF POSSESSION.—With the knowledge possessed by plaintiff, it must be presumed that he purchased the west half of the lot in view of the defendants' possession by means of their house, to the extent of its occupation thereof.

ID.—LAND OCCUPIED BY BUILDINGS TO AGREED LINE—PRESUMPTION AS TO PURCHASE.—Where land is occupied by buildings to an agreed line, the grantee is presumed to have bought the property with a view to the boundaries visibly marked on the ground, and to have

relied thereon, and fixed the price according to the value of the property as thus defined and used.

ID.—PRINCIPLES OF EQUITY AND FAIR DEALING.—Under the circumstance shown by the evidence, it would be opposed to the principles of equity and fair dealing recognized by the authorities to give effect to the bare legal title, to the extent of depriving the respondents of a right honestly acquired and continuously exercised within the observation of appellant.

APPEAL from an order of the Superior Court of Solano County, denying a new trial. L. G. Harrier, Judge.

The facts are stated in the opinion of the court.

Theodore A. Bell, for Appellant.

F. R. Devlin, for Respondents.

BURNETT, J.—The evidence shows, as stated by appellant, that defendants' house projects a little more than eighteen inches over and upon the west half of lot No. 33, in block 245, in the city of Vallejo. The defendants obtained title to the east half of this lot from one Mrs. Barr, who was the owner of the entire lot. In March, 1906, the plaintiff purchased the west half of said lot from the administrator of Mrs. Barr's estate. The lot has a frontage on York street of fifty feet between two board fences which have stood in their present location for thirty years. The defendants do not claim title to the small strip in dispute through the deed from Mrs. Barr, but predicate their claim upon an oral agreement with her by which she and the defendant, Charles Grennan, agreed upon the division line. This agreement was never reduced to writing, but it is admitted by appellant that "if this were an action between Mrs. Barr and the defendants, there is no doubt that she would be estopped from disturbing the defendants in their possession of the disputed ground, simply because she knowingly permitted defendants to hold over the line." But it is contended that the vital question in the case is: Was the plaintiff an innocent purchaser without notice? And in this connection it is urged "that from the time defendants built upon the disputed premises until the plaintiff purchased from Mrs. Barr's administrator, Mrs. Barr in her lifetime, and her administrator

thereafter, occupied and was in possession of the full twenty-five feet constituting the western half of lot 33." It is conceded that defendants were also in possession of the disputed strip, but the rule is invoked that requires open, notorious and exclusive possession to impute to the purchaser of the record title notice of undisclosed equities in favor of another person. The authorities seem to be uniform as to this legal proposition. It is stated in *Smith v. Yule*, 31 Cal. 185, [89 Am. Dec. 167], as follows: "Where the vendor is in the apparent possession, the subsequent purchaser, finding the title of record in the vendor, is put upon no further inquiry, because the possession appears to be according to the title; and if at the same time another person is also in possession, there is no presumption of title in him inconsistent with that found in the vendor. . . . The subsequent purchaser is not justly chargeable with fraud in failing to make inquiry for a prior unrecorded conveyance, unless there is some fact or circumstance apparent to his observation, calculated to excite the suspicion of a prudent man dealing with the property, that a prior conveyance has been made. The existence of such a conveyance would not be suggested by the possession of a third person, while the vendor held the title appearing of record and was in the apparent possession." Other cases are cited to the same effect. It is urged by respondents, however, that the rule finds no application to the facts of this case. Attention is called to the evidence showing that "appellant was familiar with the premises for a period of nearly forty years. He knew that Grennan had purchased one-half of the lot. He knew that Grennan, during the time of construction, was erecting a building upon the half of the lot claimed by him, and he knew that Grennan was living alone with his own family in the house he had erected and that there was no division of possession between himself and Mrs. Barr."

Upon the assumption that the foregoing quotation from respondents' brief is a full statement of the facts, it could not be gainsaid that respondents' position is entirely sound. The problem, though, is somewhat affected by the circumstance that a short time before respondents' house was erected Mrs. Barr moved her residence from the center of the lot to the rear of the same and located it so that it projected

over the agreed division line and easterly of the center of said lot.

The case, then, in brief, is this: B. owns the entire lot and sells the easterly half to G. They agree upon the division line and G. erects a residence abutting thereon. To enable him to do this B. moves her residence to the rear and leaves it partly upon G.'s property. This she occupies until the time of her death. G. and his family are the sole occupants of his residence for five years, when C., with a knowledge of all the facts, except the said agreement between B. and G., purchases the legal title to the westerly half of said lot, which includes, as we have seen, a strip about eighteen inches in width east of the said agreed line. If appellant is awarded possession of said strip respondents will be greatly damaged, or, as testified by one of the latter: "If I am compelled to move that part of my building which the plaintiff claims is on his part of the lot, I will have to cut off about eighteen inches of my house—it would practically ruin the house. It would take off the roof and part of the room that projects eighteen inches over the line claimed by plaintiff; it would certainly injure the building if that part of it were removed."

Under such circumstances what does equity require? We think there can be reasonably but one answer to the question. The moral and legal duty was cast upon appellant to make inquiry concerning these patent and obtrusive circumstances. The knowledge that respondents were building and occupying exclusively a dwelling upon the disputed tract and thus exercising acts of ownership would arrest the attention and challenge the investigation of any prudent person contemplating the purchase of the property. The peculiar location of the other building in the rear of the lot also would naturally excite comment and lead to inquiry. These two facts and circumstances were apparent to appellant's observation, and were both calculated to excite the suspicion of any prudent man that some agreement not disclosed by the record was made by the parties owning the lot. At any rate, it is undisputably true that respondents were in the open, notorious and exclusive possession of the portion of the lot covered by their dwelling, and the presumption follows that their ownership was coextensive with the claim thereby asserted, and

of this appellant was clearly put upon notice. It would be manifestly unjust, therefore, to eject respondents from the portion of the lot actually occupied by them. But the question in relation to the whole strip has been treated as one and indivisible and involving the same situation, and therefore the judgment in favor of respondents should not be disturbed. With the knowledge possessed by plaintiff it must be presumed that he purchased the west half of the lot in view of respondents' possession.

Where land is occupied by buildings up to the agreed line, the grantee is presumed to have bought the property with a view to the boundaries thus visibly marked, and to have relied thereon and fixed the price according to the value of the property as thus defined and used. (*Young v. Blake-man*, 153 Cal. 483, [95 Pac. 888].)

The cases cited by appellant clearly involve a different situation from what we have here. In the Smith case, *supra*, the vital fact is disclosed in the statement given in the syllabus: "If the owner of a lot in a city occupies part of a house on the same, and another person occupies the remainder of the house, and while this occupation of both continues the owner conveys to this other person whose deed is not recorded, and then conveys to a third person whose deed is first recorded, the possession of the one having the unrecorded deed is not sufficient to give notice to the subsequent purchaser," and this, for the reason that the possession appears to be according to the title.

In *Taylor v. Central Pac. R. R. Co.*, 67 Cal. 615, [8 Pac. 436], it was held upon conflicting evidence that the claimant had not settled upon nor improved the land in controversy, and it appeared that the subsequent applicant had no knowledge that any portion of the land had been inclosed by plaintiffs or that they had made any application for the purchase thereof, the contest involving the question as to whether plaintiffs or the defendant Davis should be preferred as the purchaser of certain land belonging to said company.

In *Shumacher v. Truman*, 134 Cal. 431, [66 Pac. 591], it was held that "the possession of a tenant of the divorced husband after the decree of divorce must be presumed to be the possession of the divorced wife, as a tenant in common

with him, and is consistent with and not adverse to the record title of the divorced wife, and did not put the purchaser from her upon inquiry as to any equitable rights of the divorced husband under the unrecorded agreement." This, of course, must follow from the principle that either of the cotenants was entitled to the possession of the whole of the land as against everyone except his cotenant and that the possession of one cotenant is presumed to be for his benefit and also for that of his cotenant. His possession or that of his tenant would therefore be no notice of any hostility to the title of his cotenant.

In *Harris v. McIntyre et al.*, 118 Ill. 275, [8 N. E. 182], it appears that the owner of the legal title was permitted "to exercise, so far as the public could see, exclusive control and management of the farm and its products," without objection by the claimant of the equitable title, or the assertion of any right on her behalf, "while she to all appearances was simply the housekeeper for her brother, and as far as shown by the proof, apparently, to the world, occupied the premises in no other capacity."

In the case of *Lindley v. Martindale*, 78 Iowa, 379, [43 N. W. 233], the title to the lands was in a son of the plaintiff, who resided on a portion of them, while plaintiff and her husband resided on another portion, but the lands had for a long time been cared for by both the husband and the son. It was justly held that one who, upon being told that the title was all right in the son, took a mortgage from the son to secure a loan which was used for the most part to pay off prior encumbrances placed on the land by the son, was not charged with the alleged equities of plaintiff by reason of her claimed possession of the land. Since the son exercised acts of ownership jointly with his father, it negatived any inference that might arise from the existence of separate residences. Besides, it was decided that the plaintiff was estopped by her conduct from setting up the claim of any equitable interest in the premises.

In *Atwood v. Bearss*, 47 Mich. 72, [10 N. W. 112], it was held that the fact that the husband lived on the premises with his wife did not constitute notice of an unrecorded deed from her to him.

Wells v. Am. Mort. Co., 109 Ala. 430, [20 South. 136], is to the same effect, where it is declared that "The possession of land by the grantee, holding under an unrecorded deed together with her grantor, is not constructive notice of the unrecorded deed to a subsequent purchaser."

In *Pope v. Allen*, 90 N. Y. 298, it also appeared that both defendant and P. lived upon the land at the time of the conveyance to plaintiff and apparently occupied it jointly. Plaintiff had no actual notice of defendant's rights. "Held, that as P. had the record title the proper inference was that defendant's possession was under him and in subordination to his title."

McCarthy v. Nicrosi, 72 Ala. 332, [47 Am. Rep. 418], and *Townsend v. Little*, 109 U. S. 504, [3 Sup. Ct. Rep. 357], likewise present the situation of a joint occupancy.

Here, under the circumstances shown by the evidence, it would be opposed to the principles of equity and fair dealing recognized by the authorities, to give effect to the bare legal title to the extent of depriving respondents of a right honestly acquired and continuously exercised within the observation of appellant.

The order denying the motion for a new trial is affirmed.

Hart, J., and Chipman, P. J., concurred.

[Crim. No. 228. First Appellate District.—May 30, 1910.]

THE PEOPLE, Respondent, v. E. W. EMMONS, Appellant.

CRIMINAL LAW—MODE OF DETERMINING SUFFICIENCY OF INDICTMENT.—

The correct way to determine the sufficiency of an indictment is to take its language in its ordinary accepted meaning, and its statements as to the matters and things that defendant did, and then compare them with the statute which it is claimed has been violated, for the purpose of determining the question as to whether or not the defendant is charged in plain language with having done a particular act or thing which is made a crime by the statute.

Id.—OBTAINING MONEY UNDER FALSE PRETENSES—SUFFICIENCY OF INDICTMENT.—An indictment stating that defendant did on a specified day, knowingly, falsely and fraudulently, pretend and represent to

a person named, that he, the said defendant, was the sole owner of a mining claim described, and that there was then being erected and constructed on said mine a ten-stamp mill, and that all litigation concerning the mining claim was settled, and which avers the particular falsity of each and all of said pretenses and representations, and that such person, believing each and all of them to be true, was thereby induced to deliver to defendant the sum of \$500, and that defendant fraudulently and feloniously received, took and carried away the same, sufficiently states the crime set forth in section 582 of the Penal Code.

ID.—UNNECESSARY AVERMENTS—EVIDENTIARY FACTS.—It was not necessary, and would have been bad pleading, for the indictment to state what the defendant intended to do with the money, or that the money was never returned to the person defrauded, or any other evidentiary fact.

ID.—MATTER OF DEFENSE.—If the defendant did not obtain the money in the manner charged in the indictment, or if it was paid to him with full knowledge of all the facts and circumstances, or if it was a loan, or given to him for the purpose of depositing in bank, such fact or facts could be shown by him in defense.

ID.—PURPOSE OF INDICTMENT ANSWERED.—The indictment has answered its purpose when it fully and fairly informs the defendant of the acts he is accused of, so that he can prepare for his defense and defend himself as to such acts, and so that it can be determined, as matter of law, whether or not such facts as are alleged in the indictment constitute a crime under the statute; and the indictment is sufficient if the acts stated show a violation of the statute.

ID.—DEMURRER TO INDICTMENT AND MOTION IN ARREST OF JUDGMENT PROPERLY OVERRULED.—The indictment being sufficient, a demurrer thereto, and a motion in arrest of judgment for its insufficiency, were properly overruled.

ID.—SUPPORT OF VERDICT.—The evidence is held sufficient to support the verdict of guilty of the offense charged.

ID.—DEFENDANT'S RIGHT TO STAND MUTE—PREJUDICIAL ERROR IN REFUSING INSTRUCTION—IMPERTINENT SUBSTITUTION—REVERSAL.—The court erred to defendant's prejudice, requiring a reversal in refusing his requested instruction that "the defendant has a legal right to take the stand as a witness, or not to do so, just as he pleases, or as his counsel may advise. The mere fact that he does not testify raises no presumption or prejudice against him, and the jury cannot draw any unfavorable inference against a defendant who does not offer himself as a witness"; and in substituting in lieu thereof section 1323 of the Penal Code, involving the impertinent right to cross-examine a defendant who testifies.

ID.—RIGHT OF DEFENDANT TO FAIR TRIAL — CORRECT INSTRUCTION NOT ROBBED OF FORCE.—The defendant was entitled to a fair trial, and to a correct instruction pertinent to the issue, without having it coupled with another statement not pertinent to the issue, which robbed it of all its force as to defendant's rights.

ID.—CONSTITUTIONAL RIGHTS OF DEFENDANT.—The defendant has the constitutional right to stand mute, without unfavorable presumption from his silence, and to demand that the prosecution prove the case against him beyond a reasonable doubt.

ID.—DUE ADMINISTRATION OF JUSTICE—ABSENCE OF PREJUDICIAL INSTRUCTIONS.—It tends to the due and proper administration of justice for the trial court to leave the jury entirely free to pass upon each and every fact and phase of the case, without any prejudicial instructions, or any intimation by the court as to the weight of the evidence. When an instruction is asked for by a defendant which contains a correct statement of the law, and is pertinent to the issue and the evidence, it should be given, without being weakened or emasculated by an additional statement not so pertinent, although in the abstract containing a correct statement of the law.

ID.—CONDITIONAL INSTRUCTION AS TO CROSS-EXAMINATION OF DEFENDANT IMPROPER.—No occasion can arise during a trial of a criminal case for giving the jury an instruction as to the fact that the defendant could be cross-examined, if he should be a witness, when he is not a witness. If he were a witness, the court and not the jury would determine the question of his cross-examination and the extent thereof; and the jury should not be given an instruction as to substantive law which is for the court and not for the jury under any circumstances.

ID.—ERROR IN REFUSING INSTRUCTION AS TO REASONABLE DOUBT OF FALSE PRETENSES CHARGED.—It was error for the court to refuse an instruction requested by defendant as follows: "If you should have a reasonable doubt in your minds as to whether the prosecuting witness parted with her money because of the representations set forth in the indictment, or any of them, or whether, on the other hand, she so acted by reason of and induced by other or different representations, then you should give the defendant the benefit of the doubt, and your verdict should be not guilty."

ID.—GIST OF CHARGE — SUBSTANCE OF REPRESENTATIONS ESSENTIAL — OTHER INDUCEMENTS—MAIN CAUSE OF LOSS OF MONEY.—The false pretenses stated are of the gist of the offense charged, and the substance of them must be proved beyond a reasonable doubt. It is not necessary, however, that they shall be the sole inducement, since other false pretenses may have co-operated therewith; but it is essential that the false pretenses charged should have been the

main cause that operated in the mind of the prosecuting witness when she parted with her money.

ID.—APPEAL—ARGUMENT—ERRORS NOT POINTED OUT IN BRIEF.—When counsel rely upon other errors in the giving or refusing of instructions, it is due to this court that the brief of the appellant should call attention to the facts and the law sufficient to show in what way the giving or refusing of the instruction injures the defendant appealing.

ID.—EVIDENCE—FALSE REPRESENTATIONS AS TO NUGGET CHAIN—GUILTY INTENT—KNOWLEDGE OF FALSITY OF STATEMENTS CHARGED.—Evidence was admissible to show false representations by defendant to the prosecuting witness that a nugget chain shown her in the presence of a witness was made of nuggets taken from the mine. In this class of cases, evidence of similar offenses, involving the making of other false representations is admissible to show that he is aware of the falsity of the statements made by him in the particular case on trial. The law is liberal in allowing other false statements to be shown, for the purpose only of showing guilty intent, or guilty knowledge of the falsity of statements that the party is making.

ID.—REOPENING CASE TO PROVE ADMISSIONS BY DEFENDANT—SPECULATION AS TO DEFENDANT BECOMING WITNESS.—The district attorney relying upon admissions made by defendant on a former trial should have proved them in chief; and the practice should not be tolerated of his reliance upon the uncertain event of the defendant taking the stand in his own behalf, so as to make them part of his case on cross-examination. In such case the district attorney did not stand in a favorable position to ask or invoke the discretion of the court to reopen his case, to prove such admissions; but the discretion of the court in allowing it is not passed upon, in view of reversal upon other grounds.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Wm. P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Joseph A. Brown, and Thomas V. Cator, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

COOPER, P. J.—The defendant was convicted of the crime of obtaining money by false pretenses, and sentenced to a

term of six years in the state prison at San Quentin. He prosecutes this appeal from the judgment and from the order denying his motion for a new trial.

It is contended that the court erred in overruling the defendant's demurrer to the indictment and also in denying his motion in arrest of judgment. As each of said contentions depends upon the question as to whether or not the indictment states facts sufficient to constitute a public offense, we will consider them together.

The way, and the only correct way, to determine the sufficiency of an indictment is to take its language in its ordinary accepted meaning, and its statements as to the matters and things that defendant did, and then compare them with the statute which it is claimed has been violated, for the purpose of determining the question as to whether or not the defendant is charged in plain language with having done a particular act or thing which is made a crime by the statute. (*People v. Schmitz*, 7 Cal. App. 330, [94 Pac. 407, 419].) The Penal Code (section 532) provides that every person who knowingly, by any false or fraudulent representation or pretense, defrauds another person of money, is punishable in the same manner and to the same extent as for larceny of the money so obtained. The indictment states that the defendant did, on the day named therein, knowingly, feloniously and fraudulently pretend and represent to Mrs. M. E. Hurst that "he the said defendant was then at said time the sole owner of a certain mine or mining claim and real property called 'Drummer Boy Mine,' located at Siskiyou county in the state of California, and that there was then at said time being erected and constructed at said mine upon said property a ten-stamp mill, and that the said mine and property had been in litigation for over thirty years, but that the said litigation had then been and was then all settled; whereas in truth and in fact said defendant was not then or at any time the sole owner of said mine, mining claim and real property, and there was not then or at any time a ten-stamp mill or any mill being erected or constructed at said mine or upon said property; and the said mine and property had not then or at any time been in litigation for over thirty years, but in truth and in fact the said mine and property was then at said time in litigation, and said litiga-

tion had not then at said time been all settled or settled at all." It further states that Mrs. Hurst, believing the said false representations to be true, and solely by reason of them, was induced to and did deliver to defendant the said sum of \$500, and that defendant fraudulently and feloniously received, took and carried away the same. This is sufficient under the statute. It is not necessary, and indeed would have been bad pleading, for the indictment to state what the defendant did or intended to do with the money, or that the money was never returned to Mrs. Hurst, or any other evidentiary fact. If the defendant did not obtain the money in the manner charged in the indictment, or if it was paid to him with the full understanding of all the facts and circumstances, or if it was a loan, or given to him for the purpose of depositing in a bank, such fact or facts could have been shown by him in defense. The indictment has answered its purpose when it fully and fairly informs the defendant of the acts he is accused of, so that he may prepare for his defense and defend himself as to such acts, and so that it may be determined as a matter of law whether or not such facts as are alleged in the indictment constitute a crime under the statute. If the acts as stated show a violation of the statute, the indictment is sufficient. We therefore conclude that the demurrer was properly overruled, and the motion in arrest of judgment properly denied.

We have examined the evidence, and we find it sufficient to support the verdict, and it is not necessary to further discuss it.

After the case was closed on behalf of both prosecution and defense, and the defendant had rested, the district attorney claimed that he had been surprised by the defendant not calling and examining certain witnesses (evidently referring to the fact that the defendant had not taken the stand as a witness in his own behalf), and that for this reason he had not put in a material declaration or admission made by defendant on a former trial of the same charge, as he expected to elicit such evidence on cross-examination. The court, under the objection of defendant, reopened the case, and the district attorney was permitted to and did read a portion of defendant's evidence given on a former trial. Defendant then asked the court, after the evidence was con-

cluded, to instruct the jury as follows: "The defendant has a legal right to take the stand as a witness, or not to do so, just as he pleases or as his counsel may advise. The mere fact that he does not testify raises no presumption or prejudice against him, and the jury cannot draw any unfavorable inference against a defendant who does not offer himself as a witness." The court refused the instruction, but in lieu thereof read section 1323 of the Penal Code as an instruction to the jury, which section and instruction is as follows: "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, but if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him or be used against him on the trial or proceeding."

This was error, and clearly injurious to the defendant. The instruction as requested contained a correct statement of the law pertinent to the issue, and under the circumstances it was very material to the defendant that it should have been given. The court, in effect, instead of telling the jury that a failure of the defendant to testify should not create a prejudice or unfavorable inference in the minds of the jury, told them that a defendant could not be compelled to be a witness against himself, "but if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." It was not a question before the jury as to what could be done if the defendant had taken the stand as a witness for himself, nor as to whether he could be compelled to testify against himself. It seems, therefore, plainly apparent that the effect of reading section 1323 of the Penal Code was to inform the jury that the fact that defendant, if he had taken the stand, could have been cross-examined was probably the reason why he did not take the stand as a witness. If this were not so, why did the court read the law to the jury as to the effect of something that had not occurred instead of giving the instruction as requested?

The defendant was entitled to a fair trial. He was entitled to a simple statement of the law pertinent to the issue, without having it coupled with another statement, not per-

inent to the issue, which robbed it of all its force as to defendant's rights. He had the right to stand mute. No presumption is raised against him by the law if he choose to remain silent. (*People v. Streuber*, 121 Cal. 432, [53 Pac. 918].) In *People v. Cuff*, 122 Cal. 589, [55 Pac. 407], the defendant did not take the stand as a witness, and the court instructed the jury: "The court instructs you that the evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and that therefore if weaker or less satisfactory evidence is offered, and it appears that stronger or more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust."

The instruction given in that case was correct as an abstract proposition of law, and evidently was founded on section 2061, subdivisions 6 and 7, of the Code of Civil Procedure; but the court held its effect was to emphasize the fact that the defendant had not taken the stand in his own behalf, and that the giving of it was prejudicial error. The court in discussing the matter said: "Let us consider one objection to it. Here there is no suggestion whatever in the record that any important witness could have been produced by the defendant before the jury and was not produced. Under such circumstances certainly the occasion was not a proper one upon which to give the instruction. But, upon the other hand, the defendant did not take the stand, and the practical application of the instruction necessarily points to that fact as a strong circumstance to be taken against him. To the ordinary mind there seems to have been no other reason or purpose in the giving of the instruction. Yet a defendant has the constitutional right to stand mute and demand that the prosecution prove the case against him beyond a reasonable doubt."

The reasoning there applies with much force to this case. The defendant had not offered himself as a witness, so why should the court of its own volition have stated to the jury that if he had taken the stand he could have been cross-examined? It was most prejudicial and damaging to the defendant. It ordinarily tends to the due and proper administration of justice for the trial court to leave the jury

entirely free to pass upon each and every fact and phase of the case without any prejudicial instructions, or any intimation by the court as to matters of fact or as to the weight of evidence. When any instruction is asked by a defendant which contains a correct statement of the law and is pertinent to the issue and to the evidence, it should be given. The court should not weaken or emasculate an instruction by coupling with it a sentence or statement not pertinent to the issue or the evidence, although in the abstract containing a correct statement of the law. We cannot conceive of any occasion arising during the trial of a criminal case for giving the jury an instruction as to the fact that the defendant could be cross-examined if he should be a witness. If he was not a witness and had not offered himself as such, certainly the instruction should not have been given. If he had offered himself as a witness the court, and not the jury, would determine the question of his cross-examination and the extent thereof. It was wholly unnecessary for the court to voluntarily state to the jury a proposition of substantive law which is for the court and not for the jury under any circumstances.

The court also erred in refusing defendant's requested instruction numbered 16, which is as follows: "If you should have a reasonable doubt in your minds as to whether the prosecuting witness parted with her money because of the representations set forth in the indictment, or any of them, or whether, on the other hand, she so acted by reason of and induced by other or different representations, then you should give the defendant the benefit of that doubt, and your verdict should be not guilty."

If the jury entertained a reasonable doubt as to whether Mrs. Hurst parted with the money by reason of the representations set forth in the indictment, they should have acquitted defendant. The indictment charges that Mrs. Hurst was induced by said false representations and pretenses. That is the gist of the charge; and certainly if that is not true, and the money was obtained by other or different means or representations the defendant should not have been convicted. It is true that the false representations and pretenses charged may not have been the sole inducement, or, in other words, other causes or pretenses or promises may

have in such cases acted in connection with and in aid of the alleged false representations; but at the same time the false pretenses and representations charged in the indictment must have been the main cause that operated on the mind of the complaining witness when she parted with the money. The jury should have been satisfied beyond a reasonable doubt that the representations and pretenses charged in the indictment caused Mrs. Hurst to part with her money. If this were not so the jury might have convicted, although not satisfied beyond a reasonable doubt that the prosecution had proven the material allegations of the indictment.

The refusal of the court to give other instructions requested by defendant is pointed out as error by calling attention to the number of such instructions separately, and stating that the court erred in refusing them. As we have said many times before, when counsel rely upon error in the giving or refusing of an instruction, it is due to this court that the brief should at least call attention to the facts and the law sufficient to show in what way the giving or refusing of the instruction injured the defendant. However, we have examined the requested instructions, and the court no doubt properly refused the greater number of them, or gave instructions which substantially covered the subject matter thereof. Others might properly have been given, but we are not prepared to say, in view of the whole record, that the refusal of the court to give any one of them was error sufficient to justify a reversal of the case.

The claim is made that the court erred in receiving the evidence of the witness Cook as to representations made by defendant to Mrs. Hurst about a gold nugget chain which he said was made from nuggets picked up at the mine the stock of which he was trying to sell to Mrs. Hurst. The record shows that the witness testified without objection to the fact that defendant showed Mrs. Hurst the chain, and told her that the nuggets of which it was made came out of the mine. Some of the nuggets were small and some of them large and rough-shaped. The objection to the testimony was made later, when the witness was asked to describe the size and shape of the nuggets. If any error was committed it had been committed before the defendant objected to the testimony; but without regard to the form or

time of the objection, we are not prepared to say that the evidence was inadmissible. In this class of cases evidence of similar offenses, involving the making of other false representations, is admissible against the defendant to show that he is aware of the falsity of the statements made by him in the particular case on trial. The law is liberal in allowing other false statements to be proven for the purpose, and only for the purpose, of showing such guilty intent or purpose, or guilty knowledge of the falsity of the statements that the party is making. (2 Underhill on Criminal Evidence, star pp. 672, 673; *People v. Whalen*, 154 Cal. 472, [98 Pac. 194].) Of course the evidence must tend to show a guilty intent, in connection with the crime under investigation, and must not be received to show other and distinct crimes which have no bearing upon the question of guilty intent or knowledge as to the crime for which the defendant is being tried.

What has been said applies to several other alleged errors as to testimony of similar transactions.

It is urged with much earnestness that the court erred in reopening the case at the request of the district attorney for the purpose of allowing him to prove certain statements made by the defendant on a former trial. The district attorney should have put in all his evidence in chief, and not have relied upon the uncertain event of the defendant taking the witness-stand in his own behalf so that he could make out a part of his case by cross-examination. Such practice is not to be tolerated. Of course in cases where the district attorney has inadvertently or through ignorance omitted to put in certain material evidence, but has acted in good faith, and the court is satisfied that he has so acted, it should be liberal in allowing the case to be reopened, so that it may be fully tried upon all the facts; but in case the district attorney deliberately keeps back a part of his testimony so as to surprise the defendant by bringing it out in cross-examination, at the same time speculating upon the contingency as to whether or not the defendant will take the stand, a more serious question arises. It may certainly be said that in such case the district attorney does not stand in a very favorable position to ask or invoke the discretion of the court to reopen his case. However, it is not necessary for us to pass upon the question as to whether or not the court abused

its discretion, for the reason that upon a retrial of the case the district attorney will certainly not again speculate on the chances of the defendant taking the stand as a witness in his own behalf.

We do not deem it necessary to discuss any other point. For the error in refusing the instructions asked by defendant as herein pointed out, the judgment and order are reversed, and the case remanded for a new trial.

Kerrigan, J., and Hall, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 28, 1910.

[Civ. No. 712. First Appellate District.—May 30, 1910.]

TUOLUMNE WATER POWER COMPANY, a Corporation,
Respondent, v. **W. A. FREDERICK, Appellant.**

EMINENT DOMAIN—CONDEMNING RIGHT OF WAY FOR ELECTRIC POWER LINE—PUBLIC USE—SUFFICIENCY OF COMPLAINT.—A complaint in an action to condemn a right of way over defendant's land for an electric power line, which states the name of the corporation in charge of the alleged public use, and that it was organized to furnish electric power, light and heat to counties, cities, towns and villages, and the inhabitants thereof, and to acquire, by right of eminent domain, rights of way over lands for the transmission of electric energy and power, and that plaintiff seeks to condemn the alleged right of way for a public use, to wit, the transmission of electric energy and power for public sale, and that plaintiff is in charge of said public use, and of said alleged rights, is sufficient as against a general demurrer.

ID.—MEAGER COMPLAINT AS TO FACTS SHOWING "PUBLIC USE"—ABSENCE OF SPECIAL DEMURRER THERETO.—Although the complaint is not a model in its meager statement of facts showing that the use is a "public use," yet it is sufficient in the absence of a special demurrer on that ground.

ID.—INTENTION OF PLEADER—SALE TO "PUBLIC GENERALLY."—Constructing the allegations of the complaint together, it is evident that the pleader, though alleging its purpose to condemn the right of way for the transmission of electric energy and power "for public sale," intended to allege its purpose to condemn the same for the transmission of electric energy and power for "sale to the public generally."

ID. — MEANING OF "PUBLIC USE" — JUDICIAL QUESTION — LEGISLATIVE DECLARATION.—The term "public use" is of indefinite signification. While what is a public use is a judicial question, yet, in a doubtful case, the legislative declaration is of great persuasive force.

ID.—DECLARATION IN STATUTE AS TO "PUBLIC USES"—"ELECTRIC POWER LINES" — RIGHT OF WAY FOR "PUBLIC USES."—The statute authorizes the right of eminent domain in behalf of certain public "uses," among which are included "electric power lines." To condemn a right of way for an electric power line, for the transmission of electricity to be sold to the public, to furnish power, light and heat to counties, cities, towns and villages, and the inhabitants thereof, is clearly for "public uses," within the declaration of the statute.

ID.—CONTRACTUAL OBLIGATION NOT PREREQUISITE TO CONDEMNATION—SPECIAL DEMURRER.—A special demurrer to the complaint, on the ground that it does not appear therefrom that the plaintiff is under any contract to furnish electricity to any person, or that it has a franchise to furnish electricity to any counties, cities or villages through which its proposed line is to run, is not tenable. It is not necessary that the plaintiff seeking to condemn a right of way should have made a contract to furnish electric power before it had installed its plant and procured the right of way for its line.

ID.—EXISTING FRANCHISE NOT REQUIRED.—To prevent the plaintiff from exercising the right of eminent domain until it shall have obtained a franchise from some city or village, or made a contract to furnish its product to some city or village, would be to deprive it of the means by which it would be enabled to construct its works and be put in a position to make said contract.

ID.—NARROW CONSTRUCTION OF "PUBLIC USE" FOR ELECTRIC POWER IMPROPER.—In view of the present use of electric power for numerous public purposes, which has become so general that it is almost a necessity of our modern civilization, and considering the great enterprises of the west, the courts should not give a narrow and restricted construction of the words "public use" as used by the legislature, or in the constitution.

ID.—AMOUNT OF DAMAGES TO DEFENDANT — CONCLUSIVE VERDICT.—Where the jury were fairly and fully instructed as to the various matters to be considered in arriving at the amount of damages to defendant, their verdict upon the evidence as to such amount is conclusive.

ID.—EVIDENCE—TESTIMONY OF PLAINTIFF'S SURVEYOR—COURSE OF ELECTRIC LINE — IMMATERIAL CROSS-EXAMINATION — COUNTY ROADS.—Where plaintiff's surveyor and civil engineer testified in chief as to where the electric line commenced and its general course, and on cross-examination stated that after it reached Alameda county,

it runs on a private line, except over county roads, a further question, "How many county roads does it cross over?" was properly excluded as immaterial.

ID.—SCOPE OF CROSS-EXAMINATION — DISCRETION OF COURT — MATERIALITY AND PREJUDICIAL ERROR MUST APPEAR.—The cross-examination of a witness and the extent to which it may be carried rests largely in the discretion of the trial court. In order to predicate error on its refusal to allow "a question thereon, it must appear not only that the evidence sought was relevant and material, but also that the materiality is so evident that injury will be presumed from its exclusion."

ID. — INSTRUCTION AS TO LOCATION OF ELECTRIC LINE — BURDEN OF PROOF.—The court properly instructed the jury to the effect that the plaintiff, under the law, has the right to construct its line in the manner and place it deems best, provided that the location is made in a manner most compatible with the greatest public good and the least possible private injury; and that in case it is claimed that the plaintiff has not so located its line, the proof to the contrary must be clear and convincing.

ID.—PRESUMPTION OF CORRECT ACTS BY CONDEMNING PLAINTIFF—BURDEN UPON OWNERS.—In the absence of evidence to the contrary, the acts of the plaintiff in exercising a public function in surveying its line, and locating the land to be condemned, must be presumed to be correct and lawful, and to be the best choice for the public; and if this occasions peculiar and unnecessary damage to the owners of the property, the proof thereof must come from them, and ought to be clear and convincing, since otherwise no location could be effected.

ID.—INSTRUCTION AS TO BURDEN OF PROOF OF VALUE OF LAND TAKEN—NOMINAL DAMAGE—VERDICT FOR SUBSTANTIAL DAMAGES.—An instruction that the burden of proof as to the value of the lands of defendant was upon the defendant, and that unless he has shown by sufficient proof that he will be damaged by the erection of the towers and transmission line thereupon, as claimed in the complaint, "then he is entitled only to a nominal damage at your hands," was correct as to the burden of proof, and did not tell the jury that the plaintiff was entitled only to nominal damage. The instructions as to damages were full and complete; and where the jury by their verdict gave only substantial damages, they evidently were not misled as to nominal damage.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. William H. Waste, Judge.

The facts are stated in the opinion of the court.

F. J. Castelhun, for Appellant. Archibald Barnard and Crittenden Thornton, *Amici Curiae*, also for Appellant, on Petition for Hearing in Supreme Court.

Chickering & Gregory, for Respondent.

COOPER, P. J.—This action was brought to condemn a right of way over defendant's lands for an electric power line. The case was tried with the aid of a jury, and a verdict rendered fixing the amount of defendant's damages at \$450. Judgment was accordingly entered in favor of plaintiff as prayed and fixing the damages for the right of way at the sum so found by the jury.

Defendant prosecutes this appeal from the judgment and order.

The first contention made by defendant is that the court erred in overruling his demurrer to the complaint. His argument is that the complaint does not show that the use for which it is sought to condemn the property is a public use. The Code of Civil Procedure provides (section 1238) as follows:

“Subject to the provision of this title the right of eminent domain may be exercised in behalf of the following public uses . . .

“12. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

“13. Electric-power lines, electric-heat lines, and electric light, heat and power lines.”

Section 1241 of said code provides that before the property can be taken it must appear, first, that the use to which it

is to be applied is a use authorized by law; second, that the taking is necessary to such use.

In condemnation proceedings the essentials required in the complaint are set forth in Code of Civil Procedure, section 1244, and after requiring that the name of the corporation or person in charge of the public use must be stated, it is provided that the complaint must contain "a statement of the right of plaintiff." This phrase evidently means a statement of the facts sufficient to show that the plaintiff is authorized to maintain the condemnation suit.

The complaint in this case contains the name of the corporation in charge of the alleged public use, and states that the corporation was organized and its purpose, among other things, was "to furnish electric power, light and heat to counties, cities, villages and towns, and the inhabitants thereof, and to acquire by right of eminent domain rights of way over lands for the transmission of electric energy and power." The complaint further avers that the plaintiff seeks to condemn the right of way for a public use, to wit, "the construction, maintenance and operation of an electric power-line for the transmission of electric energy or power for public sale, which said electric power line is to be of the character described in this complaint." This is followed by a statement that the plaintiff is in charge of said public use and the right to construct, operate and maintain an electric power line for such purpose, and to acquire and maintain a right of way for the same. While the complaint is certainly not a model as to the statement of facts showing that the use is a public use, yet it is sufficient when attacked by a general demurrer. It is evident the pleader intended to allege that its purpose was to engage in the operation of an electric power line for the transmission of electric energy and power for sale to the public generally; and although the words "for public sale" are used, we must look to all the allegations of the complaint in order to arrive at the solution of the question as to whether or not it states facts sufficient to constitute a cause of action. Particularly is this so in the face of the fact that the defendant demurred to the complaint upon five special grounds, but did not intimate in either of the grounds that it could not be ascertained from the complaint that the use for which the right of way was sought was a public use.

The term "public use" is a term of indefinite signification. The statute authorizes the right of eminent domain in behalf of certain public uses, among which are included "electric power lines." While what is a public use is a judicial question, yet in a doubtful case the legislative declaration is of great persuasive force. (*Lindsay I. Co. v. Mehrrens*, 97 Cal. 676, [32 Pac. 802]; *Walker v. Shasta Power Co.*, 160 Fed. 856, [87 C. C. A. 660].) It fairly appears from the complaint in this case that the plaintiff sought the right of way for an electric power line for the transmission of electricity, to be sold to the public to furnish power, light and heat to counties, cities, villages and towns, and the inhabitants thereof. Clearly such are public uses, and are expressly so declared to be in the statute.

The main argument as to the special demurrer is that it does not appear, and cannot be ascertained from the complaint, that the plaintiff is under any contractual obligation to furnish electricity to any person for any purpose, or that it has a franchise to furnish electricity to any counties, cities or villages through which the proposed line is to run. It is not necessary that the plaintiff should have made a contract to furnish electric power before it had installed its plant and procured the right of way for its line. To prevent the plaintiff from exercising the right of eminent domain until it shall have obtained a franchise from some city or village, or made a contract to furnish its product to some city or village, would be to deprive it of the means by which it would be enabled to construct its works and be in a position to make a contract. (*Minn. Canal Co. v. Pratt*, 101 Minn. 197, [112 N. W. 395].) The legislature representing the people has provided that the right of eminent domain may be exercised for electric power lines for public use. At the present day the use of electric power, not only for lighting streets and private houses, but also for the purpose of moving railroad cars, street-cars, machinery for manufacturing purposes and for use in mines and smelters, has become so general that it is almost a necessity of our modern civilization. The courts would not be aiding the great enterprises of the west by adopting a narrow and restricted view of the meaning of the words "public use" as used by the legislature and in our constitution.

The evidence is sufficient to show that the plaintiff desires to construct its line for public and not for private use. The jury were fully and fairly instructed as to the various matters to be considered in arriving at the amount of damage to defendant, and their verdict upon the evidence is conclusive.

Appellant in his brief enumerates many alleged errors in the rulings of the court upon the admission or rejection of evidence which he characterizes as "glaring errors." The first one of these alleged errors—and presumably the most important in his estimation—is as to a question asked of the witness Zoffmann. Zoffmann testified in direct examination that he was a surveyor and civil engineer; that he had been engaged in running the electric line for plaintiff. He then described the point where the line commences and its general course, and stated that in its course it crosses the counties of Calaveras, Stanislaus, San Joaquin and the lower portion of Alameda county, and runs to the Mission San Jose. He then described the general nature of the towers desired to be erected for the purpose of the power line, and particularly the towers desired to be erected on the defendant's land, and the distance of the proposed cable to the ground as it would pass over defendant's land. He then testified in cross-examination, in answer to questions asked by defendant's counsel, that after the line enters Alameda county it runs entirely on a private line with the exception of crossing over county roads. The defendant's counsel then asked the witness the question: "How many county roads does it cross over?" The question was objected to upon the ground that it was incompetent, irrelevant and immaterial, and the judge of the trial court sustained the objection, at the same time stating that he did not see the materiality of it. Like the trial judge, we fail to see how it was material to the defendant as to the number of county roads the plaintiff's line crossed. It could not aid in the solution of the question before the court as to the plaintiff's right to condemn the right of way over defendant's land, and at the places where its proposed line was to cross the defendant's land, by showing that it crossed many public roads at other places than on defendant's land. Counsel has not even given us a reason why the evidence sought was material. He con-

tents himself with saying, "Defendant submits that the question was proper cross-examination." It is elementary that the cross-examination of a witness, and the extent to which such cross-examination may be carried, rest largely in the discretion of the trial court, and that in order to predicate error upon the refusal to allow a question to be asked on such cross-examination it must appear that the evidence sought was relevant and material; and not only this, but that its materiality is so evident that injury will be presumed from its exclusion.

The other objections and alleged errors, while several in number, are of similar import. It is sufficient to say that we have examined them, and find none of them of sufficient importance to justify discussion.

Complaint is made that the court instructed the jury to the effect that the plaintiff under the law has the right to construct its line in the manner and place it deems best, provided it uses the most available route, and provided that the location is made in a manner most compatible with the greatest public good and the least private injury; and that in case it is claimed that the plaintiff has not so located its line, the proof must be clear and convincing. In our opinion the rule is correctly stated in the instruction. It is in almost the identical language used by the chief justice in *City of Pasadena v. Stimson*, 91 Cal. 255, [27 Pac. 604], where it is said: "The state, or its agents in charge of a public use, must necessarily survey and locate the land to be taken, and are by statute expressly authorized to do so. (Code Civ. Proc., sec. 1242.) Exercising as they do a public function under express statutory authority, it would seem that in this particular their acts should, in the absence of evidence to the contrary, be presumed correct and lawful. The selection of a particular route is committed in the first instance to the person in charge of the use, and unless there is something to show an abuse of discretion, the propriety of his selection ought not to be questioned; for certainly it must be presumed that the state or its agent has made the best choice for the public, and if this occasions peculiar and unnecessary damage to the owners of the property affected, the proof of such damage should come from them. And we think that when an attempt is made to show that the loca-

tion made is unnecessarily injurious, the proof ought to be clear and convincing; for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so *ad infinitum*. The improvement could never be secured, because whatever location was proposed it could be defeated by showing another just as good." (See further *San Francisco & S. J. V. Ry. Co. v. Leviston*, 134 Cal. 413, [66 Pac. 473]; *Kansas Ry. Co. v. Northwestern Coal Co.*, 161 Mo. 288, [84 Am. St. Rep. 717, 61 S. W. 684].)

Complaint is made of the eleventh instruction given by the court to the jury at the plaintiff's request. The instruction is as follows: "I charge you that the burden of proof as to the value of the lands of defendant was upon the defendant. Unless he has shown you by sufficient proof that he will be damaged by the erection of said towers and transmission line as in said complaint contained, then that he is entitled only to a nominal damage at your hands."

The rule was correctly stated to the effect that the burden of proof was upon the defendant to prove the damages he would sustain. The court did not, as suggested by counsel, tell the jury that the plaintiff was entitled to only nominal damages. The instructions elsewhere fully covered the subject, and stated to the jury the matters and things to be considered by them in determining the amount of damages to which the defendant would be entitled. And not only this, but by their verdict it is shown that they gave the defendant substantial and not nominal damages.

Other instructions are criticised, but we find no substantial error in the giving or refusing any instruction to which our attention is called. The court seems to have given to the jury a full and fair statement of the law applicable to the issues and the questions which were before the court.

The judgment and order are affirmed.

Hall, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 28, 1910.

[Civ. No. 743. First Appellate District.—May 30, 1910.]

EMMA L. LYNAM, Administratrix, etc., of the Estate of GOTTLIEB DAMKROEGER, Deceased, Respondent, v. ERNEST VORWERK, Executor, etc., of KAROLINA DAMKROEGER, Deceased, Appellant.

HUSBAND AND WIFE—PROPERTY ACQUIRED AFTER MARRIAGE—PRESUMPTION OF COMMUNITY PROPERTY.—All property acquired after marriage is presumed to be community property in the absence of evidence showing that it was acquired by gift, bequest, devise or descent.

ID.—POSSESSION OF MONEY AFTER MARRIAGE—JOINT DEPOSIT IN SAVINGS BANK—PRESUMPTIONS APPLICABLE.—Where money was in the possession of the husband and wife, long after their marriage, and it was jointly deposited by them in a savings bank, such possession and deposit raises the presumptions that the property was acquired after marriage and that it was community property, in the absence of any proof to the contrary.

ID.—PROPERTY RELATION OF HUSBAND AND WIFE—QUASI PARTNERSHIP.—The relation of husband and wife as to their property is somewhat in the nature of a partnership, where there is usually partnership property and the separate property of the copartners.

ID.—PRESUMPTION OF PARTNERSHIP PROPERTY—DEPOSIT IN JOINT NAMES.—If the partners should jointly go to a bank and deposit money in their joint names, it seems, in the absence of other evidence, that the money was the joint money of such copartners, and that it being in their possession, as such, it would be presumed to have been acquired by the copartnership.

ID.—MONEY DEPOSITED AFTER MARRIAGE—BURDEN OF PROOF—CONCLUSIVE PRESUMPTION.—Where money was deposited in bank after marriage by husband and wife, in their joint names, the burden of proof is upon the wife, or her representatives, to show that she had a separate interest therein, and in the absence of such proof, the presumption that it was community property is absolute and conclusive.

ID.—JOINT TENANCY NOT CREATED BY JOINT WRITTEN DEPOSIT.—The writing given to the bank showing that the deposit was in their joint names payable to either on the return of the book did not have the effect to create a joint tenancy in the husband and wife, with right of survivorship.

ID.—JOINT INTEREST MUST BE EXPRESSLY DECLARED.—Under section 683 of the Civil Code, it is provided that "a joint interest is one owned by several persons in equal shares, by a title created by a

There was no evidence other than as herein stated as to the source from which the money came, or as to its being the common, joint or separate property of either husband or wife.

Gottlieb, the husband, died in April, 1903, leaving Karolina surviving him. After her husband's death Karolina withdrew the deposit. She qualified as administratrix of the estate of her deceased husband, but never accounted for the moneys so withdrawn by her as any part of the assets of his estate.

In January, 1907, she died, and this action was afterward brought against the executor of her last will and testament.

The plaintiff relied upon the provisions of section 164 of the Civil Code, which declares that all property acquired after marriage by either husband or wife, except that acquired by gift, bequest, devise or descent (Civil Code, section 163), is community property. The section expressly provides that all property acquired by either husband or wife after marriage is community property. The property (money) was in the possession of the husband and wife long after their marriage, and was by them jointly deposited in the bank. Does the fact that the husband and wife are in possession of money after their marriage raise a presumption that it was acquired after such marriage? In our opinion it does. The relation of husband and wife as to their property is somewhat in the nature of a partnership, where there is usually partnership property and the separate property of the copartners. If the copartners should jointly go to a bank and deposit money in their joint names, it seems, in the absence of other evidence, that the most reasonable inference would be that the money was the joint money of such copartners, and that being in their possession as such copartners, it would be presumed to have been acquired by the copartnership. In fact, usually and in most cases where money or property is in the possession of the husband or wife or both after marriage, it has been acquired after marriage. This is a matter of common knowledge. Of course, such possession raises only a presumption, which may be overcome by evidence as to the facts; but in the absence of such evidence the presumption is sufficient. It has been held that the possession of money by either or both husband and wife after marriage, in the absence of other evidence, raises a presumption that it is

community property. In *Fennell v. Drinkhouse*, 131 Cal. 447, [82 Am. St. Rep. 361, 63 Pac. 734], it was so held. The court there said: "All of the money found in the bank and received by the said administrator was deposited after the marriage of plaintiff and Mrs. Fennell, and the presumption therefore was, in the absence of other evidence, that all of it was community property, and the burden of proof was upon appellant. This presumption can be overcome by evidence of a clear, certain and convincing character establishing the contrary, and the burden of this showing rested with the parties claiming the separate character of the property. In the absence of such proof the presumption as to the community character was absolute and conclusive."

To the same effect, see *Denigan v. Hibernia Sav. & Loan Society*, 127 Cal. 137, [59 Pac. 389]; *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, [78 Am. St. Rep. 35, 59 Pac. 390]; *Rowe v. Hibernia Sav. & Loan Society*, 134 Cal. 403, [66 Pac. 569]; *Freese v. Hibernia Sav. & Loan Society*, 139 Cal. 392, [73 Pac. 172].

The appellant contends that the writing given to the bank had the effect to create a joint tenancy in the husband and wife, with the right of survivorship. In our opinion such contention is not plausible. It is provided in the Civil Code (section 683): "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." The writing given to the German Savings and Loan Society was merely an authority to the bank to pay the amount entered in the pass-book to either of the parties in whose name the deposit was made. The title to the money was not created by a will or transfer, nor was it granted to executors or trustees as joint tenants. Neither does section 1431 of the Civil Code aid appellant. The writing given to the bank did not create a right in favor of the husband and wife to the money. As before stated, it was a mere authority to the bank as to paying the deposit on surrender of the pass-book. (See *Denigan v. San Francisco Sav. Union*, 127 Cal. 142, [78 Am. St. Rep. 35, 59 Pac. 390].)

The judgment and order are affirmed.

Hall, J., and Kerrigan, J., concurred.

[Crim. No. 245. First Appellate District.—May 30, 1910.]

THE PEOPLE, Respondent, v. FRANK BALLARD, Appellant.

CRIMINAL LAW—APPEAL FROM JUDGMENT AND ORDER—FAILURE TO REVERSE ORDER—REMEDY OF DEFENDANT—MOTION FOR DISCHARGE—POWER OVER ORDER.—Upon a former appeal to this court, in a criminal case, from a judgment of conviction and from an order denying defendant's motion for a new trial, where this court reversed the judgment without expressly ordering a new trial, and failed to dispose of the order, but did not direct the discharge of the defendant, or the dismissal of the case, the sole remedy of the defendant was to apply to this court for such discharge, whereupon this court could dispose of the order denying his motion for a new trial, which, in effect, would have been the ordering of a new trial.

ID.—EFFECT OF REVERSAL OF JUDGMENT—JURISDICTION OF TRIAL COURT—NEW TRIAL—DISMISSAL NOT REQUIRED.—The reversal by this court of the judgment of conviction, without ordering a dismissal of the case, or the discharge of the defendant, had the effect to leave the trial court with jurisdiction to proceed with the trial of the case, and it was not required to dismiss the action on the ground that a new trial was not expressly ordered by this court.

ID.—GENERAL OBJECTION TO DEPOSITION OF ABSENT WITNESS—FAILURE TO SWEAR WITNESS NOT INCLUDED—OBJECTION UPON APPEAL. A general objection to the deposition of an absent witness taken at the preliminary examination that the testimony was "immaterial, irrelevant, incompetent and hearsay" did not include the specific objection that the "witness was not sworn," and that objection cannot be urged upon appeal for the first time on the ground that the record fails to show that the witness was sworn, especially where the record shows that the same counsel which represented him in the trial court represented him at the preliminary examination, and cross-examined him thereon, but does not show that he there made such objection.

ID.—DUTY OF COUNSEL TO OBJECT TO KNOWN GROUND.—If in fact the transcript offered in evidence did not show that the absent witness gave his testimony under oath, it was the duty of defendant's counsel to specifically make the objection upon that ground, in order that the court may be informed thereof, and that the record upon appeal may clearly show whether or not the absent witness was sworn.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

Thomas F. Greeley, for Appellant.

U. S. Webb, Attorney General, and Maxwell McNutt, Assistant District Attorney, for Respondent.

HALL, J.—This is an appeal from a judgment against defendant, and the order denying defendant's motion for a new trial.

Defendant upon a previous trial was convicted, and upon appeal from the judgment and order denying his motion for a new trial this court reversed the judgment, but failed to expressly or in terms dispose of the appeal from the order denying the motion for a new trial. Neither did this court upon the former appeal expressly order a new trial nor direct the discharge from custody of the defendant. (Pen. Code, sec. 1262; *People v. Ballard*, 1 Cal. App. 222, [81 Pac. 1040].)

Upon the calling of the case for trial after the going down of the *remittitur*, defendant objected to the trial proceeding, upon the ground that the court had no jurisdiction to proceed, no new trial having been ordered by the appellate court. This objection was overruled and the trial proceeded.

Defendant now contends that because this court failed to order a new trial upon reversing the former judgment, the trial court should have dismissed the action.

We think the point has been disposed of adversely to defendant's contention by the decision of the supreme court, to which he applied for a discharge from custody upon *habeas corpus*. (*Ex parte Ballard*, 149 Cal. 114, [84 Pac. 833].) The court pointed out that where, as in this case, the appellate court reverses a judgment without either ordering a new trial or directing the discharge of the defendant, such action is evidently the result of inadvertence and of a temporary forgetfulness of the provisions of section 1262, Penal Code, and that in such case the remedy of the defendant would be

a motion in such court for an order directing such discharge. If such motion had been made this court could have made a proper order disposing of the case. As it appears that the judgment upon the first appeal was reversed for a cause that required the granting of the motion for a new trial, this court could, and doubtless would, if its attention had been called to the fact that it had failed to dispose of the appeal from the order denying the motion for a new trial, have made an order reversing such order. This in effect would have been the ordering of a new trial. (*People v. Hardisson*, 61 Cal. 378.)

The judgment of conviction having been reversed, and this court not having ordered the discharge of the defendant or a dismissal of the action, the trial court had jurisdiction to proceed with a new trial.

It is also contended that the court erred in overruling the objection of defendant to the reading in evidence the deposition of an absent witness taken on the preliminary examination of the defendant. It is not claimed upon this appeal, as it was upon the former appeal, that it had not been sufficiently shown that the witness could not be found. The record before us shows that the testimony of the absent witness was read from a transcript of such testimony taken before the police court, and, of course, then present in court. It is now urged that it does not appear that the witness who gave the testimony was sworn. No such objection was made before the trial court. The objection simply was that the testimony was "immaterial, irrelevant, incompetent and hearsay." If, in fact, the transcript from which the district attorney read did not show that the witness gave the testimony under oath, and if the real point of the objection was that the witness was not sworn, it was the duty of counsel to specifically make the objection upon that ground. By the general objection that the evidence was "incompetent and hearsay," the court was not informed of the point now urged in this court. If it had been, doubtless the record would clearly show whether or not such witness was sworn at the preliminary examination. The record does not show that he gave his testimony without objection from defendant, who was there represented by the same counsel who represents him now, and that the witness was cross-examined by such

counsel. Under such circumstances we do not think that the objection now urged was presented by the objection actually made to the trial court.

No other point is made for a reversal, and the judgment and order are affirmed.

Cooper, P. J., and Kerrigan, J., concurred.

[Civ. No. 813. First Appellate District.—May 30, 1910.]

STATE BOARD OF HEALTH OF THE STATE OF CALIFORNIA, Appellant, v. THE BOARD OF TRUSTEES OF WATSONVILLE SCHOOL DISTRICT OF SANTA CRUZ COUNTY, CALIFORNIA, and JAMES A. HALL, CHARLES H. RODGERS, and EDWARD A. HALL, as Trustees of Said Watsonville School District, etc., Respondents.

PETITION FOR WRIT OF MANDATE—REFUSAL OF SCHOOL TRUSTEES TO EXCLUDE UNVACCINATED CHILDREN — JUDGMENT UPON DEMURRER — REVIEW UPON APPEAL.—Upon a petition in the superior court by the state board of health to compel the board of trustees of the school district, defendant, to exclude unvaccinated children therefrom, which they had refused to do as required by the general vaccination act of February 20, 1889 (Stats. 1889, p. 23), where judgment was rendered for defendants upon demurrer to the petition, and directing a dismissal thereof, the petition must be taken as true for the purpose of decision upon appeal, and the judgment must be reversed with direction to overrule the demurrer thereto.

Id.—CONSTITUTIONALITY OF VACCINATION ACT—POLICE POWER FOR PUBLIC HEALTH—JUDGMENT OF LEGISLATURE.—The general vaccination act of February 20, 1889, is constitutional. The legislature is necessarily the judge as to legislation under the police power for the public health, and to prevent the spread of contagious diseases, and provide the means used to prevent such spread and the diseases regarded as contagious.

Id.—LIMITATION UPON POWER OF COURTS.—The discretion vested in the legislature within the scope of its power cannot be controlled by the courts, if not plainly abused. Its acts are the acts of the people, and if an act is oppressive or unjust, the remedy is with the people through the legislature. It is not for the courts to inter-

fere, or in any way set up their judgment against that of the legislature as to general police powers of the state.

ID.—VACCINATION ACT MANDATORY.—The general vaccination act is not directory, but mandatory, upon the trustees of all school districts and the boards of common school government in all cities and towns to exclude from the benefits of the common or public schools therein all unvaccinated children.

ID.—VACCINATION ACT NOT REPEALED BY COMPULSORY EDUCATION ACT. The vaccination act of 1889 is not repealed or affected by the compulsory education act of 1905 (Stats. 1905, p. 388). There is no inconsistency between these acts, and repeals by implication are not favored. While parents must send their children to school under the latter act, if they desire to send them to the common schools, they must comply with the former act, which continues to apply to all common or public schools, and is not in any way modified or superseded by the latter act.

APPEAL from a judgment of the Superior Court of Santa Cruz County. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

J. E. Gardner, for Appellant.

James A. Hall, for Respondents.

COOPER, P. J.—This case comes here on appeal from a judgment of the superior court of Santa Cruz county, sustaining the demurrer of the defendants to plaintiff's petition for a writ of mandate, and directing the entry of judgment for the defendants, and that the plaintiff's petition herein be dismissed.

The plaintiff is the state board of health, and the defendants are the trustees of Watsonville School District. The petition must be taken as true for the purposes of this decision. It appears therefrom that the petitioner has demanded, and that the defendants as such trustees have at all times refused, and now refuse, to exclude from the benefit of the common schools of said district all unvaccinated children residing therein. It is claimed to be the duty of defendants, as trustees, by virtue of their office, to exclude from said school all school children who have not been vaccinated, under an act of the legislature entitled "An act to encourage

and provide for general vaccination in the State of California," approved February 20, 1889 (Stats. 1889, p. 32).

It is contended by the said school trustees that the said act is unconstitutional and void, for the reason that it is an abuse of the police power of the state.

We have no doubt as to the constitutionality of the act. The legislature must necessarily be the judge as to legislation under the police power for the public health and for the purpose of preventing the spread of contagious diseases, the means used to prevent such spread, and the diseases regarded as contagious. It is invested with a large discretion within the scope of its powers, which discretion cannot be controlled by the courts except in cases where such discretion has been plainly abused. Its acts are the acts of the people; and as the legislature is selected by the people for the purpose of enacting legislation, if an act is oppressive and unjust, the remedy is with the people through the legislature. It is not for the courts to interfere, or in any way to set up their judgment against that of the legislature, as to the general police powers of the state. It is sufficient for the purposes of this decision that the act has been held constitutional in *Abbel v. Clark*, 84 Cal. 227, [24 Pac. 383], and in *French v. Davidson*, 143 Cal. 659, [77 Pac. 663].

The statute is not directory but mandatory. It provides: "The trustees of the several common school districts in this state and boards of common school government in the several cities and towns are directed to exclude from the benefits of the common schools therein any child or any person who has not been vaccinated, until such time when such child or person shall be successfully vaccinated. . . ." It is the plain duty of the trustees, and they are directed by the express terms of the statute, to exclude from the public schools any child or person who has not been vaccinated. Until the child has been vaccinated he must be excluded from the schools. If the trustees could use their discretion, and of their own will at times exclude and at other times admit to the schools children who have not been vaccinated, or if the trustees could exclude some children and admit others, the law would be uncertain and of little value. It was never the intention under the terms of the act that the board of trustees should possess such discretion. By its terms all are to be excluded,

and the exclusion is to continue as to all until they have complied with the law. The duty devolves upon defendants by virtue of their office to exclude such children. They must obey and not question the law. They are not compelled to hold their respective offices as such trustees; but while in office it is their duty, and the duty of each and every one of them, to see that the law is enforced, and this whether the law is popular or unpopular, or whether they believe in the vaccination of children or otherwise. The law having been passed by the people, it is the duty of the trustees and of all persons to obey it until it is repealed.

The act was not repealed by the subsequent compulsory education act (Stats. 1905, p. 388). The latter act is not inconsistent with the former. Repeals by implication are not favored. The parents of children are compelled to send them to school under the latter act, but they must comply with the law as to having them vaccinated in case they desire to avail themselves of the privilege of sending them to the common school. There is nothing in the latter act to show that it was intended to supersede or do away with or in any way modify the previous act.

The judgment is reversed, and the court below directed to overrule the demurrer.

Hall, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 25, 1910.

[Civ. No. 769. First Appellate District.—May 30, 1910.]

In the Matter of the Estate of LUIGI GUINASSO, Deceased.
NELLIE GUINASSO, Proponent of Will, Respondent,
v. MARIA ARATA and LOUIS GUINASSO, Contestants, Appellants.

WILLS—PROBATE OF DESTROYED WILL—FINDING AS TO PROOF OF CONTENTS UNSUPPORTED.—Where a will destroyed in the great conflagration in San Francisco was admitted to probate under section 1339 of the Code of Civil Procedure, the necessary finding that the contents of the will were proved by two credible witnesses was unsupported, where the only credible witness was one who drew the will and knew its contents, and was qualified to prove them by parol, and the only other witness to its contents was that of one who had never seen or read the will, but had merely heard it or a copy of it read to her by the one who drew the will.

ID. — CONSTRUCTION OF STATUTE — INTENTION OF LEGISLATURE. — The legislature intended when it enacted the requirement that two credible witnesses must be produced to prove the contents of a destroyed will, that each of them must give primary evidence, or evidence from personal knowledge as to the contents of the will, and it never contemplated that one of such witnesses might in effect multiply himself into any number of witnesses by reading a will, or stating its contents, to other persons.

ID.—CONTENTS OF WRITING NOT PROVABLE BY HEARER.—The contents of a writing cannot be proved by the testimony of a person who heard the writing read.

ID.—EFFECT OF STIPULATION UPON APPEAL—DUE EXECUTION OF WILL — WAIVER OF FINDING—PROOF OF CONTENTS NOT INVOLVED.—A stipulation upon appeal that "the will of said deceased was proved to have been duly executed by him before two attesting witnesses," and waiving the assignment of insufficiency of the evidence to prove the same, has no bearing upon the assignment of insufficiency of the evidence to sustain the finding as to proof of the contents of the will. Proof of the provisions of a destroyed will is quite a different matter from proof of its due execution before two attesting witnesses.

APPEAL from an order of the Superior Court of the City and County of San Francisco admitting a will to probate.
Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Sullivan & Sullivan, and Theo. J. Roche, for Appellants.

Bourdette & Bacon, for Respondent.

HALL, J.—This is an appeal from an order admitting to probate the will of Luigi Guinasso, deceased.

The petition for the probate of the alleged will was filed by John W. Bourdette, and sets forth that the will was destroyed by the great conflagration of April, 1906, which occurred in San Francisco, and also sets forth what purports to be the provisions of the will *in haec verba*. It is also alleged that the testator at the time of his death believed the will to be in existence, and had no notice or knowledge of its destruction.

Appellants are heirs at law of decedent, and in due time filed a contest of the will. The court made findings in favor of the proponent as to all issues raised by the pleadings, and it is the sufficiency of the evidence to support these findings that is attacked by appellants.

In their opening brief three points were made by appellants: First, that the evidence did not support the finding as to the due execution of the alleged will; second, that the evidence did not support the finding that decedent had no notice or knowledge of the destruction of the will, and that he believed it to be in existence at the time of his death; and third, that the evidence is insufficient to support the finding of the court as to the provisions of the will.

Subsequently, by stipulation filed in this court, appellants waived the first point.

We have examined the evidence as to the second point, and do not think that appellants' contention can be maintained, but as we think the third point is well taken, we have not deemed it necessary or profitable to review the evidence under the second point.

As before stated, the will was offered as a will destroyed by public calamity. Section 1339, Code of Civil Procedure, provides that: "No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently, or by public calamity, destroyed in the lifetime of the testator, without his knowledge, nor

unless its provisions are clearly and distinctly proved by at least two credible witnesses."

According to the record before us only two witnesses testified as to the contents of the destroyed will—J. Bourdette and respondent Nellie Guinasso.

J. Bourdette drew the will, and of course had knowledge of its contents. Upon the destruction of the will his parol testimony was competent to prove its provisions.

But the record shows that the only knowledge that Nellie Guinasso had of the contents of the will was from hearing what purported to be the will or a copy thereof read by Mr. Bourdette. She does not claim to have herself read the will, but only that it was read to her by Mr. Bourdette. She testified: "Mr. Bourdette held the will in his hand and read it to me. I am not able to swear whether it was the original or a copy."

Does such testimony comply with the law that the provisions of a destroyed will must be clearly and distinctly proved by at least two credible witnesses?

It is contended by appellants that the law requires that two witnesses must be produced, each one of whom gives primary evidence, or evidence from personal knowledge as to the contents of the will, and that a destroyed will cannot be established by one witness testifying to its contents from personal knowledge, and another testifying to its contents from statements made to him by the witness who had personal knowledge of its contents.

This contention seems to be sound. If Mr. Bourdette, the first witness, had testified that he did read the will to the second witness, which he did not, and that it was correctly read to her, it is apparent that the whole proof would finally depend upon the credibility of Mr. Bourdette. The legislature never contemplated, when it enacted the requirement that the provisions of a destroyed will must be clearly and distinctly proved by at least two credible witnesses, that one such witness might in effect multiply himself into any number of witnesses by reading a will or stating its contents to other persons.

The contents of a writing cannot be proved by the testimony of a person who heard the writing read. (*Propst v. Mathis*, 115 N. C. 526, [20 S. E. 710]; *Nichols v. Kingdom*

Iron Ore Co., 56 N. Y. 618; *Mutual Life Ins. Co. v. Tillman*, 84 Tex. 31, [19 S. W. 294].)

Respondent, in answer to the contention of appellants upon this point, has contented herself with urging that appellants are precluded from making this point by the stipulation filed in this court.

This stipulation has no bearing upon the sufficiency of the evidence to prove the provisions of the will, but only relates to the proof upon the issue as to its due execution. It is clearly a stipulation only "that the will of said deceased was proved to have been duly executed by him before two attesting witnesses, and that proof of such execution was duly made in" the trial court, and that the "first point made by appellant in his points and authorities on file herein" is waived.

Proof of the provisions of a destroyed will is quite a different matter from proof of its due execution before two attesting witnesses.

The provisions of the destroyed will were not clearly and distinctly proved by at least two credible witnesses, and for this reason the finding as to the provisions of the will is not supported by the evidence.

The order admitting the will to probate is reversed.

Cooper, P. J., and Kerrigan, J., concurred.

[Crim. No. 217. First Appellate District.—May 31, 1910.]

THE PEOPLE, Respondent, v. JACKSON HATCH, Appellant.

CRIMINAL LAW—GROUNDS FOR SETTING ASIDE INDICTMENT—IRREGULARITIES IN IMPANELMENT OF JURY.—Under section 995 of the Penal Code, enumerating the grounds for setting aside an indictment, no mere irregularities in the formation and impanelment of the grand jury other than such as are grounds of challenge, either to the panel or to an individual juror, are grounds for setting aside the indictment.

ID.—GROUNDS OF CHALLENGE LIMITED TO DEFENDANT NOT HELD TO ANSWER.—The grounds of challenge to the panel of the grand jury or

to an individual grand juror can only be relied upon by a defendant who has not been held to answer before the finding of the indictment.

ID.—BILL OF EXCEPTIONS NOT SHOWING RIGHT OF CHALLENGE.—Where the bill of exceptions upon this appeal does not show that this defendant was not held to answer before the finding of the indictment, in the absence of such showing it cannot be presumed that he was not. The appellant must affirmatively show error, and as his right to rely upon grounds of challenge to the panel or to an individual juror depended upon his not having been held to answer before the finding of the indictment, the record on appeal must show it.

ID.—RECITAL IN MOTION TO SET ASIDE INDICTMENT NOT EVIDENCE.—A recital in the motion to set aside the indictment that the defendant had not been held to answer before the finding of the indictment is not evidence of that fact.

ID.—AFFIDAVIT UPON APPEAL NO PART OF RECORD.—An affidavit of the defendant filed in this court, which on its face does not appear to have been read or used on the hearing of the motion to set aside the indictment, but upon a motion for continuance of the hearing thereon, is no part of the record upon appeal.

ID.—EXCLUSION OF GRAND JURORS—OPINIONS AGAINST DEFENDANT—ADVICE OF DISTRICT ATTORNEY—REVIEW UPON APPEAL.—It is questionable whether the departure of three grand jurors from the jury-room while the grand jury was acting upon the indictment against the defendant, upon the advice of the district attorney, on the ground that they had expressed unfavorable opinions against the defendant, falls within the ground of motion to set aside the indictment on the ground that it was "not found, indorsed or presented," as prescribed in subdivision 1 of section 995 of the Penal Code. But in passing upon the action of the trial court the evidence must be viewed in the light most favorable to the action of the trial court.

ID.—PURPOSE AND EFFECT OF ACTION OF DISTRICT ATTORNEY.—The action of the district attorney was for the purpose of preventing disqualified jurors from acting upon the indictment. By reducing the number of the grand jurors, it reduced the chance for obtaining twelve affirmative votes for an indictment; and the defendant could not have been injured thereby.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—ADVICE TO GRAND JURY AS TO SUFFICIENCY OF EVIDENCE—VALIDITY OF INDICTMENT NOT AFFECTED.—The alleged misconduct of the district attorney in advising the grand jury that the evidence was sufficient to warrant an indictment, though disapproved of, cannot affect the validity of the grand jury, nor constitute a ground of a motion to set aside the indictment found thereby, not being included in any of the grounds specified in section 995 of the Penal Code.

ID.—COMPETENCY OF EVIDENCE BEFORE GRAND JURY NOT REVIEWABLE.—

While the law contemplates that only competent evidence be received by the grand jury, yet if it should receive incompetent evidence and should find an indictment thereon, there is no method of reviewing its action in so doing.

ID.—NATURE OF INDICTMENT—ACCUSATORY PAPER—IRREGULARITIES NOT REVIEWED.—

An indictment is but an accusatory paper, and it was not intended that on a motion to dismiss, irregularities before the grand jury should be reviewed except as expressly provided in the statute.

ID.—INDICTMENT—RECORD OF JUDICIAL BODY—FINALITY OF ACTION.—

An indictment is a record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for reviewing it.

ID.—PROPER ACTION OF TRIAL COURT—REFUSAL OF PROOF—SUFFICIENCY AND COMPETENCY OF EVIDENCE BEFORE GRAND JURY.—

The trial court committed no error in refusing to allow the defendant to introduce evidence as to the sufficiency and competency of the evidence heard by the grand jury. The court cannot inquire into the sufficiency of proof, or the mode of examining witnesses to invalidate an indictment.

ID.—MOTION TO STRIKE INDICTMENT FROM FILES.—

A motion to strike an indictment from the files is in substance and effect a motion to set aside the indictment, and was properly denied.

ID.—DEMURRER TO INDICTMENT—PARTICIPIAL FORM OF AVERMENT.—

The use of the participial form of averment in alleging facts necessary to the statement of an offense is not to be commended, but it is sufficient in the face of a general demurrer under the liberal system of pleading allowed in this state.

ID.—EMBEZZLEMENT—TWO OFFENSES NOT ALLEGED.—

An indictment for embezzlement does not charge two offenses in alleging both that the defendant secreted the money with the fraudulent intent to appropriate it and that he did fraudulently appropriate it.

ID.—CONJUNCTIVE AVERMENTS PERMISSIBLE.—

Where, as in section 506 of the Penal Code, defining embezzlement, several acts are prohibited and made punishable, the defendant may be charged conjunctively with doing two or more of the prohibited acts, and the indictment will not be open to attack for duplicity.

ID.—INSTRUCTION FOR DEFENDANT PROPERLY REFUSED—CORPUS DELICTI—REASONABLE DOUBT—ADMISSIONS.—

An instruction requested for the defendant which required that the *corpus delicti* must be proved beyond a reasonable doubt, before extrajudicial statements or admissions of the defendant may be considered at all, was properly refused. The correct rule is that there must be some proof of the body of the crime before extrajudicial statements or admissions of the defendant may be considered, but it is not required that such

proof shall go to the extent of establishing the crime beyond all reasonable doubt.

ID.—MISLEADING INSTRUCTION—"TRUST RELATIONS"—CIVIL DUTIES.—

Where defendant testified that he borrowed money from the prosecuting witness, who denied such loans, and testified that he was her agent and attorney to negotiate loans and invest the money securely for her benefit, and it appeared that he was in fact insolvent when he claimed to have made the loans for himself without security, and did not disclose to her his financial condition, an instruction which, after stating the right of defendant to borrow money and the nature of the crime charged as a "misappropriation of property received by him in a trust relation," became prejudicially misleading by adding words applicable to mere civil duties: "In all matters connected with trust relations an agent, attorney or trustee is bound to act in the highest good faith toward his principal, client or beneficiary, and cannot obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat or adverse pressure of any kind."

ID.—CONTROVERTED MATTER BEFORE JURY—EMBEZZLEMENT OF MONEY

OF PROSECUTRIX—NATURAL SUPPOSITION OF JURY.—The only controverted matter before the jury was as to whether or not defendant embezzled the money of the prosecutrix. They would naturally suppose that the instruction as to "trust relations" was intended to guide them in determining that question, and that it was intended to inform them that if he obtained a loan from her by the slightest concealment, he was guilty of embezzlement in so doing.

ID.—CORRECT STATEMENT OF LAW AS TO CIVIL RELATIONS—ERRONEOUS

RULE FOR GUIDANCE OF JURY AS TO EMBEZZLEMENT.—While the latter part of the instruction was a correct statement of the law governing the relations of an agent or attorney and his principal concerning their respective duties and rights in their civil relations, it was misleading and incorrect as a rule for the guidance of a jury in determining whether or not the agent was guilty of embezzlement; and under the condition of the evidence, and in the connection in which the latter part of the instruction was given, it was erroneous and prejudicial to the rights of the defendant.

ID.—EVIDENCE OF DISTINCT EMBEZZLEMENTS.—Where the evidence for

the prosecution shows that if defendant is guilty at all, he is guilty of several distinct embezzlements, and that the appropriations of moneys to his own use were not made at one time, but at different times and in different amounts, under such circumstances, each appropriation is a distinct offense.

ID.—DUTY OF DISTRICT ATTORNEY TO ELECT.—Where several substantive

offenses have been proved, either one of which would support a verdict of guilty under the indictment charging one offense, the district attorney should elect as to which offense he will rely upon for a conviction.

ID.—PROOF OF RECEIPT OF SEPARATE MONEYS NOT REQUIRING ELECTION.

Proof of the mere receipt by the defendant of separate items of money does not put the district attorney to an election of the first item proved. It is not the receipt of the money, but the fraudulent appropriation of it, which constitutes the offense; and it will be possible for defendant to receive many items before embezzling any money. It may happen that an aggregate sum of money received at different times may be appropriated by one act.

ID.—PREJUDICIAL COURSE OF DISTRICT ATTORNEY—ERRONEOUS INSTRUCTION.—

When, under the evidence, several distinct appropriations were shown, it was prejudicially erroneous for the district attorney, instead of electing to rely upon one of them, to secure an instruction that if the jury "should find that defendant was the agent, attorney or trustee" of the prosecutrix, "and as such agent, attorney or trustee he received her money as charged in the indictment, and within three years" prior to the indictment "fraudulently appropriated it to an amount above fifty dollars, not in the due and lawful execution of his trust, but to his own use and benefit, you must find the defendant guilty as charged in the indictment."

ID.—POWER OF JURORS UNDER INSTRUCTION.—

Under such instruction, in view of the evidence, the several jurors could range over the evidence at will, and pick out any of a dozen or more offenses proved, and found his verdict thereon; and no court could say from the record of which offense proved under the indictment the jury found the defendant guilty. No instruction should be given which will permit the jurors to find upon more than one offense.

ID.—PROOF NOT LIMITED TO OFFENSE PROPERLY ELECTED.—

Where the district attorney has properly elected to rely upon one offense, the proof is not limited to such offense only. In embezzlement cases, other embezzlements may be proved for the purpose of proving intent, system, knowledge or the like, and it is often proper to prove offenses other than the substantive one upon which the indictment is predicated.

APPEAL from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

Walter H. Linforth, E. M. Rosenthal, Owen D. Richardson, and Frank Freeman, for Appellant.

U. S. Webb, Attorney General, J. Charles Jones, and Arthur M. Fee, District Attorney, for Appellant.

HALL, J.—The defendant was charged by indictment under section 506 of the Penal Code with having embezzled on the seventeenth day of February, 1908, the sum of \$37,075.42 of the money of Sarah E. Sage, intrusted to him and in his control and custody as the agent, attorney and trustee of said Sarah E. Sage. He was found guilty as charged, and made a motion for a new trial, which was denied, and judgment pronounced. From the judgment and order denying his motion for a new trial he in due time appealed to this court.

Defendant at the proper time made a motion to set aside the indictment on various grounds specified in the motion. The motion was denied, and the proceedings thereon are set forth in the bill of exceptions.

The grounds upon which an indictment may be set aside are set forth in section 995 of the Penal Code, which is as follows:

“The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases. If it be an indictment:

“1. Where it is not found, indorsed and presented as prescribed in this code.

“2. When the names of the witnesses, examined before the grand jury, or whose depositions may have been read before them, are not inserted at the foot of the indictment, or indorsed thereon.

“3. When a person is permitted to be present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, except as provided in section nine hundred and twenty-five.

“4. When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge, either to the panel or to any individual grand juror.”

It is well settled in this state that under this section no mere irregularities in the formation and impanelment of the grand jury, other than such as are grounds of challenge, either to the panel or to an individual juror, are grounds for setting aside the indictment. (*People v. Southwell*, 46 Cal. 142; *People v. Welch*, 49 Cal. 174; *People v. Colby*, 54 Cal. 37; *People v. Hunter*, 54 Cal. 65; *People v. Schmidt*, 64 Cal. 260, [30 Pac. 814]; *People v. Goldenson*, 76 Cal. 328, [19 Pac. 161]; *Bruner v. Superior Court*, 92 Cal. 267, [28 Pac. 341].)

Most of the grounds relied upon by appellant are clearly of this character.

Others are grounds of challenge, and can only be relied upon by a defendant who has not been held to answer before the finding of the indictment (Penal Code, sec. 995, subd. 4). The bill of exceptions does not show that this defendant was not held to answer before the finding of the indictment. In the absence of such showing we cannot presume that he was not. The appellant must affirmatively show error, and as his right to rely upon grounds that would have been grounds of challenge either to the panel or to an individual juror depended upon his not having been held to answer before the finding of the indictment, the record on appeal must show it. (*People v. Holmes*, 118 Cal. 444, [50 Pac. 675]; *People v. Douglas*, 100 Cal. 1, [34 Pac. 490]; *People v. McAuslan*, 43 Cal. 55; *People v. Russell*, 156 Cal. 450, [105 Pac. 416].)

True, as one of the grounds of defendant's motion, it is stated, "That this defendant had not been held to answer before the finding of said indictment," but such recital in the motion is not evidence of the fact. Appellant in this connection has called our attention to a copy of an affidavit of defendant filed in this court. But this is no part of the record on appeal, and on its face does not appear to have been read or used on the hearing of the motion to set aside the indictment, but upon a motion for a continuance of the hearing thereon.

So far as defendant now relies upon grounds that are cause for challenge, either to the panel or to an individual juror, the record does not show that he was in a position to raise such objections upon his motion to dismiss the indictment.

It is urged that the indictment was invalid and the motion to dismiss should have been granted because, as it is claimed, the district attorney excluded three grand jurors from participation in the proceedings resulting in the finding of the indictment. Presumably this is urged as showing that the indictment was "not found, indorsed and presented as prescribed in" the Penal Code (Penal Code, sec. 995, subd. 1). Whether or not the facts claimed to exist are grounds for a dismissal of the indictment is at least questionable. But in passing upon the action of the trial court we must view the evidence in the light most favorable to supporting the action

of the trial court. The district attorney's evidence upon this point is to the effect that after ascertaining from questioning the grand jurors that three of them may have entertained opinions upon the case to be submitted, and that such opinions were probably unfavorable to the defendant, he suggested that it would be better that such jurors retire and take no part in the investigation of the charges against Mr. Hatch. The three doubtful jurors accordingly took no part in the proceedings resulting in the indictment. The action of the district attorney was for the purpose of preventing disqualified jurors from acting upon the indictment. By reducing the number of jurors it reduced the chance for obtaining twelve affirmative votes for an indictment, and the defendant could not have been injured thereby. We have been cited to no case which holds that such action invalidates an indictment.

It is also urged that the indictment should have been set aside because, as it is claimed, the district attorney advised the grand jury that the evidence was sufficient to warrant an indictment. Unlike the preceding point, it cannot be claimed that this conduct affected the validity of the grand jury itself. It is presented simply as misconduct on the part of the district attorney. The authorities seem to be agreed that a district attorney should refrain from expressing an opinion to the grand jury as to the effect of evidence or the sufficiency thereof. But the only grounds for which an indictment found and returned by a valid grand jury may be set aside are those specified in section 995 of the Penal Code, and we do not think that this comes within any of the provisions of said section. The law contemplates that only competent evidence be received by the grand jury, yet if it should receive incompetent evidence and found an indictment thereon, there is no method of reviewing its action in so doing. An indictment is but an accusatory paper, and it was never intended that on a motion to dismiss, irregularities in the proceedings before the grand jury should be reviewed, except as expressly provided in the statute. "An indictment is a record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for reviewing it." (*In re Kennedy*, 144 Cal. 634, [103 Am. St. Rep. 117, 78 Pac. 34].)

The court refused to allow the defendant to introduce evidence as to the sufficiency and competency of the evidence heard by the grand jury. In this the court committed no error. "The court cannot inquire into the sufficiency of proof, or the mode of examining witnesses, to invalidate an indictment." (*In re Kennedy*, 144 Cal. 634, [103 Am. St. Rep. 117, 78 Pac. 34].)

We have examined all the contentions of appellant as to the action of the court in denying his motion to set aside the indictment, and are unable to say that the court committed any error in its ruling.

Neither did the court err in denying appellant's motion to strike the indictment from the files. This motion was in substance and effect a motion to set aside the indictment, and was properly denied.

It is urged by the appellant that the court erred in overruling his demurrer to the indictment, which is drawn under section 506 of the Penal Code defining embezzlement by an agent, attorney and trustee. The fact that the defendant was the agent, attorney and trustee of Mrs. Sage, and that he had possession and was intrusted with her money as such agent, attorney and trustee, is not alleged in direct and positive terms, but only in participial form. Thus it is alleged that the defendant "being then and there the agent, attorney and trustee of one Sarah E. Sage, and being then and there intrusted with and having in his control and custody . . . as such attorney, agent and trustee &c., &c." This defect is not specifically pointed out in the demurrer, and under the rule laid down in *People v. Bradbury*, 155 Cal. 808, [103 Pac. 215], can only be considered under the general demurrer that the indictment does not state facts sufficient to constitute a public offense.

That the use of the participial form in alleging facts necessary to the statement of an offense is not to be commended we do not doubt, but it is sufficient in the face of a general demurrer under the liberal system of pleading allowed in this state. In *People v. Ennis*, 137 Cal. 263, [70 Pac. 84], the defendant was charged with perjury, and the fact that he had been sworn was only alleged in the participial form, thus: "Having taken an oath then and there before &c., &c." It was held sufficient. The court said: "The participial form

of the averment is not the best method of stating a fact; but it is sufficient under our liberal system of pleading.”

In *People v. Hamilton* (Cal.), 32 Pac. 526, defendant was charged with embezzling money that he had received as county clerk. The method of charging the official character of the defendant and his possession of the money was substantially the same as in the case at bar. The trial court ordered an arrest of judgment, and this order was reversed by the supreme court of this state. The court expressly held that the use of the past participle in alleging the official character of the defendant and his receipt and possession of the money did not render the indictment defective. The indictment in *People v. Page*, 116 Cal. 386, [48 Pac. 326], was drawn under the same section and in the same form as is the indictment in the case at bar, and it was held sufficient as against demurrer. (See, also, to similar effect, *People v. Piggott*, 126 Cal. 511, [59 Pac. 31]; *People v. Carpenter*, 136 Cal. 392, [68 Pac. 1027].)

Neither does the indictment charge two offenses in alleging both that the defendant secreted the money with the fraudulent intent to appropriate it and that he did fraudulently appropriate it. Where, as in section 506, Penal Code, several acts are prohibited and made punishable, the defendant may be charged conjunctively with doing two or more of the prohibited acts, and the indictment will not be open to attack for duplicity. (*People v. Thompson*, 111 Cal. 242, [43 Pac. 748].)

The demurrer was properly overruled.

Many exceptions were taken during the course of the trial to rulings of the court, but we do not deem it necessary to notice any considerable number of them.

As the cause must be remanded for a new trial for errors committed by which defendant was prevented from having that fair trial to which under the law he was entitled, we shall only notice such errors and such other matters as we deem important for the guidance of the court upon the retrial.

The defendant was the agent and attorney of Sarah E. Sage for a period extending from the latter part of 1900 to about the close of 1907. During this time he attended to her business affairs, and received large sums of money for her as her agent and attorney, so that when a demand was finally made

upon him for a settlement and the payment of the amount of money in his hands belonging to Mrs. Sage, according to the theory of the prosecution he should have had in his hands money belonging to her to the amount of upward of \$31,000. During the period covered by his employment defendant had from time to time rendered to Mrs. Sage written statements, showing the receipt and disbursement of moneys for her and balances on hand. When demand was made upon him for a final accounting and settlement, he furnished a statement of the condition of his account with Mrs. Sage, and, as witnesses for the prosecution testified, made certain oral statements, or admissions concerning the money that should have been in his hands.

The defendant requested the court to charge the jury as follows: "In determining whether or not a crime has been committed in this case, apart from who committed it, you must not consider any admission or statement of the defendant; you must carefully exclude from your minds any and every statement made or alleged to be made by the defendant, when you come to consider whether a crime has been committed; and on that question you must look exclusively to the other evidence in the case. If the other evidence in the case does not show the commission of the crime charged beyond a reasonable doubt, then the defendant must be acquitted, notwithstanding his statements or admissions, if any. In other words, the law prohibits a conviction of crime solely upon the statements or admissions of the defendant." The court refused to give this instruction, and was justified in so doing. The vice of the instruction is that it requires that the *corpus delicti* be proved *beyond any reasonable doubt* before extrajudicial statements or admissions of defendant may be considered at all. This is not the law. The correct rule is laid down in *People v. Jones*, 123 Cal. 65, [55 Pac. 698]. While it is true that there must be some proof of the body of the crime before extrajudicial statements or admissions of the defendant may be considered, it is not required that such proof shall go to the extent of establishing the crime *beyond all reasonable doubt*.

The evidence of the people tended to prove that the defendant had used for his own purposes from time to time money that had come into his hands as the agent and attorney of Mrs. Sage in the aggregate of between \$30,000 and \$32,000.

Defendant claimed, and so testified, that of this amount he had borrowed from Mrs. Sage at different times sums of money aggregating about \$30,000, and was, and always had been, able and ready to pay to her the balance. Mrs. Sage testified that she had never authorized or knew of any of the so-called "loans" to defendant. The evidence also tended to show substantially without dispute that at the times that defendant claimed to have borrowed such sums of money from Mrs. Sage he was her agent and attorney, and was in a very bad way financially; that he was in fact insolvent; but made no disclosure to her of his condition, and took or made the loans to himself without giving any security to Mrs. Sage therefor. Much prominence had been given in the cross-examination of defendant as to his want of good faith in his dealings with Mrs. Sage in negotiating the alleged loans from her. In this connection, although the court charged the jury that defendant had a legal right to borrow money from Mrs. Sage, it further charged the jury as follows: "You will observe that the essential element of the offense of embezzlement of which the defendant is charged is the fraudulent conversion or misappropriation by the defendant of property received by him in a trust capacity. In all matters connected with trust relations an agent, attorney or trustee is bound to act in the highest good faith toward his principal, client or beneficiary, and cannot obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat or adverse pressure of any kind."

Under this instruction the jury would probably understand that though the money had been loaned by Mrs. Sage to defendant, yet if such loan or loans were obtained without a full disclosure of his condition by him to her, he would be guilty of embezzlement of the money thus loaned. If there could be any doubt about this construction being placed upon this instruction by the jury, such doubt is removed by the fact that after deliberating upon their verdict the jury returned into court and asked for the reading of this instruction. It and others were read, and they subsequently returned the verdict of guilty as charged.

The only controverted matter before them was as to whether or not defendant had embezzled the money of Mrs. Sage. They naturally would suppose that this instruction was in-

tended to guide them in determining that issue, and that it was intended to inform them that if he obtained the loan of her money from her by the slightest concealment, he was guilty of embezzlement in so doing. While the latter part of the instruction was a correct statement of the law governing the relations of an agent, or attorney, and his principal concerning their respective duties and rights in their civil relations, it was misleading and incorrect as a rule for the guidance of a jury in determining whether or not the agent was guilty of embezzlement. Under the condition of the evidence as above indicated, and in the connection in which the latter part of the instruction was given, it was erroneous, and we think clearly prejudicial to the rights of the defendant.

We now come to a matter that must be discussed in several aspects. As we have already stated, the defendant was charged with the embezzlement of \$37,075.42. The evidence given by the people proved that he should have had on hand when a final settlement was demanded of him about \$32,000 in money belonging to Mrs. Sage. This amount includes the moneys that he claimed had been loaned to him, and which Mrs. Sage testified she had never loaned or consented should be loaned to defendant or knew that he had loaned to himself. When the prosecution had closed its case in chief it was quite clear that if defendant was guilty at all, he was guilty of several distinct embezzlements. The statements that he rendered to Mrs. Sage from time to time indicated that he had from time to time loaned the money of Mrs. Sage, claimed to have been embezzled, in various amounts. Upon these statements the so-called loans were indicated by numbers only, although *bona fide* loans to other people were indicated by the name of the borrower. Mrs. Sage testified that she did not authorize these loans to defendant, and had never consented that he should loan such moneys to himself. There is abundant evidence in the writings to support her testimony. No reasonable person can read the record in this case without being convinced that if defendant is guilty at all, he is guilty of several distinct embezzlements. The money appropriated by him was not appropriated at one time but at different times and in different amounts. It is perfectly clear from the record that when the demand was made upon defendant for a final settlement he did not have on hand

\$30,000, or any considerable portion thereof, but had used upward of \$30,000 of Mrs. Sage's money for his own purposes, but the appropriations had been made at various times and in various amounts. Under such circumstances each appropriation is a distinct offense. (*Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627].) Under such circumstances a demand for payment of a general balance does not consolidate into one offense the several embezzlements previously committed.

Where several substantive offenses have been proved, either one of which would support a verdict of guilty under the indictment charging one offense, the district attorney should elect as to which offense he will rely upon for a conviction. (*People v. Castro*, 133 Cal. 11, [65 Pac. 13]; *People v. Williams*, 133 Cal. 165, [65 Pac. 323]; *Edelhoff v. State*, 5 Wyo. 19, [36 Pac. 627]; *Goodhue v. People*, 94 Ill. 37; *West v. People*, 137 Ill. 189, [27 N. E. 34, 34 N. E. 254]; *State v. Crimmins*, 31 Kan. 376, [2 Pac. 574]; *Mayo v. State*, 30 Ala. 32; *Stockwell v. State*, 27 Ohio, 563; *Bainbridge v. State*, 30 Ohio St. 264.)

In the case at bar a statement furnished by defendant to Mrs. Sage was introduced in evidence early in the trial. This statement showed the receipt of various sums of money during the period covered by the statement. Defendant asked the court to direct the district attorney to indicate which item he relied upon as supporting the charge set forth in the indictment. To this the district attorney replied in effect that he would connect all with the charge made in the indictment, and the request of the defendant was denied. In this the court committed no error. At this stage of the trial no offense at all had been proved, and it did not appear that more than one offense would be proved. Although the evidence at this point showed the receipt of several items or different sums of money, the embezzlement does not consist in the receipt of the money but in its fraudulent appropriation. Before a fraudulent appropriation can be supported, it must of course be shown that money has been received. It may happen that an aggregate amount may finally be appropriated by one act which was received in many items and at different times.

The defendant at several stages renewed his motion, and at different times objected to the admission of evidence upon

the theory that the proof of the first item of receipts was in law an election to predicate the charge upon that item. Appellant is mistaken in this. The mere receipt of any item of money was not an embezzlement of such item, and when the motion for an election was renewed, it is not at all clear that any embezzlement had been proved. No such motion was made at the close of the people's case or afterward. Nevertheless the course pursued by the district attorney has resulted in an error prejudicial to the defendant in a vital right. The court instructed the jury that "if you should find that the defendant was the agent, attorney or trustee of Sarah E. Sage, and as such agent, attorney or trustee he received her money as charged in the indictment, and within three years prior to March 23, 1908, fraudulently appropriated it to an amount above fifty dollars not in the due and lawful execution of his trust, but to his own use and benefit, you must find the defendant guilty as charged in the indictment."

If there had been but one offense of embezzlement proven by the evidence, this charge would have been correct; or if the court had limited the jury in clear and explicit language to the consideration of but one of the offenses proven. But in the case at bar, under the one charge set forth in the indictment several distinct and separate fraudulent appropriations had been proven, and no election had been made as to which was the substantive offense upon which the indictment was predicated. Under this instruction, in the condition of the evidence in the record, the jury could bring in a verdict of guilty as charged although each juror founded his verdict upon a different offense from that considered proven by every other juror in the box. Under this instruction, the several jurors could range over the evidence at will, and pick out any one of the dozen or more offenses proven, and found his verdict thereon. No court can say from this record of which offense proven under this indictment the jury found the defendant guilty.

In the case of *Edelhoff v. State*, 5 Wyo. 19, [36 Pac. 627], the defendant was charged with the embezzlement of \$208, which was the aggregate of eighteen months' rentals collected by him for his employers. The evidence showed that each month's rental had been converted as collected. The case was

reversed, the court saying, "No man should be tried or convicted of several offenses when he is charged with but one."

But we need not go out of our own state for authority that such an instruction as we are now considering under the facts of the case is prejudicially erroneous. In *People v. Williams*, 133 Cal. 165, [65 Pac. 323], the evidence showed that defendant had been guilty of several offenses, to wit, several rapes upon the same person, and the court gave an instruction to the effect that if the jury found that defendant had had sexual intercourse with the prosecutrix at any time within three years before the finding of the indictment, she being under sixteen years of age, etc., they must find him guilty. It does not appear that in the *Williams* case any attempt had been made to secure an election by the prosecution, or that any objection had been made to the evidence proving the several offenses; yet the court held such an instruction erroneous. The court said: "A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge as to any one of these separate offenses. . . . Such a trial, upon a charge so indefinite as to circumstance of time or place, or any particular, except by the general designation, would be a judicial farce, if it were not something a great deal worse." The court concluded by saying that when a charge may be supported by proof of one of several distinct offenses, the district attorney should indicate at the commencement of the trial what particular offense he intends to prove in support of the indictment. Such should be the rule in the case at bar, and no instruction should be given which will permit the jurors to found their verdict upon more than one offense.

In what we have said concerning the several offenses proven in this case we do not wish to be understood as indicating that only one offense can be proven by the district attorney. In embezzlement cases, as in some others, the proof is not always confined to proof of one offense. For the purpose of proving intent, system, or knowledge and the like, it is often proper to prove offenses other than the substantive offense upon which the indictment is predicated. (*People v. Gray*, 66 Cal. 271, 5 Pac. 240; *Edelhoff v. State*, 5 Wyo. 19, [36 Pac. 627].)

As the cause must be remanded for a new trial for the errors above discussed, we do not deem it necessary to pass upon the other points raised by appellant.

The judgment and order are reversed, and the cause remanded for a new trial.

Cooper, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after the judgment in the district court of appeal, was denied by the supreme court on July 28, 1910.

[Civ. No. 796. First Appellate District.—June 1, 1910.]

KATE V. BROWN, etc., Respondent, v. GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN OF CALIFORNIA, a Corporation, Appellant.

APPEAL—NOTICE—JUDGMENT AND ORDER—SUFFICIENCY OF EVIDENCE—RECORD—JUDGMENT-ROLL—ABSENCE OF EVIDENCE—PRESUMPTION—AFFIRMANCE.—Where a notice of appeal was from the judgment and from an order denying a new trial, and the appeal is based upon the sole ground that the evidence does not support the findings, but the sole record upon appeal consists of the judgment-roll comprising the complaint, answer, findings and judgment, without any evidence brought up, and the transcript fails to show that any motion for a new trial was made, in this condition of the record, it must be assumed that the evidence was sufficient to support the findings, and where the findings are sufficient to support the judgment, the judgment and order must be affirmed.

ID.—ACTION BY WIFE UPON BENEFIT CERTIFICATE—PRESUMPTION OF DEATH OF HUSBAND—DILIGENT SEARCH—CONCLUSIVE FINDING.—In an action by a wife upon a benefit certificate payable to her upon her husband's death, his death must be presumed from his prolonged absence for seven years, where it is conclusively found, in the absence of any evidence in the record, that the wife had made diligent search for her absent husband, and had made inquiries at all places where her husband might reasonably be expected to be found, if alive, and that she had exhausted every source of information in her efforts to locate him, but all without avail.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

D. S. Hirshberg, for Appellant.

Charles A. Shurtleff, and Robert B. Gaylord, for Respondent.

KERRIGAN, J.—This is an action based upon a benefit certificate issued by the defendant to the husband of the plaintiff, by the terms of which, upon the husband's death, the defendant agreed to pay to the plaintiff the sum of \$2,000.

The plaintiff's husband, Willis F. Brown, disappeared in October, 1900, and had not been heard from for more than seven years when this action was brought. In the trial court judgment went for the plaintiff, and this appeal, according to the notice thereof, is from the judgment and from an order denying a motion for a new trial.

The appeal from the judgment is based on the sole ground that the evidence does not support the findings. The only record on appeal, however, is the judgment-roll, i. e., the complaint, answer, findings and judgment. No evidence has been brought up, and the transcript also fails to show that any motion for a new trial was ever made. In this condition of the record we are bound to assume that the evidence was sufficient to support the findings. And upon examination of the findings it is apparent that they support the judgment.

Giving full force to the authorities cited to sustain appellant's position, that in addition to the absence of an individual for seven years, it must also appear that a diligent effort has been made to locate the absentee, still we cannot perceive how this aids appellant, for the court found that plaintiff had made inquiries in all places where her husband might reasonably be expected to be found if alive, and that she had also exhausted every source of information in her efforts to locate him, but all without avail.

The judgment and order are affirmed.

Hall, J., and Cooper, P. J., concurred.

[Crim. Nos. 104, 112. Third Appellate District.—June 1, 1910.]

THE PEOPLE, Appellant, v. WESTERN MEAT COMPANY, a Corporation, Respondent.

CRIMINAL LAW—ORDER SETTING ASIDE INFORMATION—NONAPPEARANCE AT PRELIMINARY EXAMINATION—CONFLICTING AFFIDAVITS—REVIEW UPON APPEAL.—Upon appeal from an order setting aside an information against the corporation respondent, where it appears that the trial court, upon conflicting affidavits, determined that there was no appearance of the corporation respondent at the preliminary examination, the order appealed from cannot be disturbed.

ID.—RULE AS TO REVIEW OF QUESTIONS OF FACT—CONFLICT.—In considering an appeal from an order made upon affidavits involving the decision of a question of fact, the appellate court is bound by the same rule that controls it where oral testimony is presented for review; and if there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established.

ID.—PRELIMINARY EXAMINATION AGAINST CORPORATION—CODE RULES NOT COMPLIED WITH—QUESTION OF VOLUNTARY APPEARANCE.—Under sections 1390–1396 of the Penal Code it is required that upon a presentment against a corporation, the magistrate must issue a summons signed by him with his name of office, requiring the corporation to appear before him at a specified time and place, to answer the charge, and the charge is required to be investigated in the same manner as in the case of a natural person. Where these rules prescribed in the Penal Code were not complied with, the only question is whether the corporation voluntarily appeared before the magistrate by its authorized attorney.

ID.—APPEARANCE BY ATTORNEY—QUESTION OF AUTHORITY—DISPROOF BY AFFIDAVITS.—There can be no doubt as to the conclusion of the court from the affidavits offered on the part of the corporation defendant that it had authorized no one to appear in its behalf, and that as matter of law no one had authority to represent it at the preliminary examination. Where an attorney without authority announced his representation of the corporation, the corporation cannot be denied the right to show by affidavits that it was not actually represented by counsel.

ID.—PRESUMPTION OF AUTHORITY OF ATTORNEY APPEARING—BURDEN OF PROOF.—It is presumed in law that an attorney appearing and acting for a party has authority to do so, and to do all other acts necessary or incidental to the proper conduct of the case, and the burden of proof rests upon the party denying such authority to sustain his denial by a clear preponderance of the evidence.

ID.—AFFIDAVITS SUPPORTING BURDEN OF PROOF.—Upon the whole of the affidavits and showing made in behalf of the corporation respondent, it is held that the trial court was justified in its conclusion that the corporation satisfied the requirement of the rule imposing upon it the burden of proof that it was not represented by counsel at the preliminary examination, and that the magistrate made a mistake in assuming that the corporation was represented by counsel, who in fact only appeared for an individual defendant examined by the magistrate.

ID.—AFFIDAVIT OF ATTORNEY INADVERTENTLY OMITTED FROM TRANSCRIPT —USE ON HEARING—IRREGULAR AMENDMENT—ORDER OF APPELLATE COURT.—Where a counter affidavit made by the attorney, alleged to have represented the respondent, was in fact used on the hearing, showing that he did not claim to represent the corporation, an amendment of the transcript by the judge without a previous order of this court was irregular, but as no prejudice can result from the irregularity, the affidavit will be ordered made part of the record.

APPEAL from an order of the Superior Court of Sacramento County setting aside an information. C. N. Post, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney General, and J. Charles Jones, for Appellant.

J. W. Lilienthal, and L. T. Hatfield, for Respondent.

BURNETT, J.—The appeal is by the people from an order of the superior court of Sacramento county setting aside the information on the ground “that before the filing thereof the defendant had not been legally committed by a magistrate.” (Pen. Code, sec. 995.)

The particular infirmity in the proceedings before the magistrate which was urged at the hearing of the motion was set forth by respondent as follows: “That said defendant was never summoned to answer any charge in any court in accordance with the requirements of section 1390 or of sections 1391 to 1396, both inclusive, of the Penal Code of California,” and “that said defendant never appeared, either in person or by counsel, before the committing magistrate or any magistrate to answer to the charge set forth in the information filed in

this proceeding or any other charge." In brief, the reason for urging the dismissal was that defendant had no notice to appear, and that it actually did not appear, either personally or by counsel, at the examination, and hence the committing magistrate had no authority to hold it to answer.

Said section 1390 provides that "upon an information or presentment against a corporation, the magistrate must issue a summons, signed by him, with his name of office, requiring the corporation to appear before him, at a specified time and place, to answer the charge, the time to be not less than ten days after the issuing of the summons."

Said section 1391 provides the form of the summons, section 1392, when and how it shall be served, and section 1393 is as follows: "At the appointed time in the summons, the magistrate must proceed to investigate the charge in the same manner as in the case of a natural person, so far as these proceedings are applicable." Other provisions place a corporation, as far as the subsequent steps are concerned, on the same footing as an individual under similar circumstances.

It is admitted that no summons at all was issued and that no process whatever was served upon the defendant corporation. It is not disputed that if the corporation did not appear, either by its proper officer or by attorney, the court below was justified in setting aside the information. There is no contention that the corporation made an appearance at said examination in any manner except by its attorney. Indeed, the only controversy here is as to whether such an appearance was made, and it is largely a question of fact. The evidence submitted consisted of certain records and affidavits, a summary of which may be necessary for an intelligent disposition of the appeal.

From the records introduced by respondent it appears that the complaint in the justice court charged the Western Meat Company, the Sacramento Butchers' Protective Association and one J. O'Keefe jointly with an offense in restraint of trade, defined in the statute of 1907 commonly known as the Cartwright act. A warrant of arrest was issued by the justice directed to a peace officer and reciting that a complaint had been filed charging the crime of conspiracy against trade had been committed, and accusing J. O'Keefe thereof, and directing said officer to arrest him and bring him before the

magistrate. The docket of the justice shows the following entries, among others: "Jan. 25. Warrant of arrest returned and filed, indorsed served on J. O'Keefe by bringing him in court, Jan. 25. One hundred dollars was deposited by defendant as cash bail. Feby. 3. Demurrer to complaint filed. Feby. 4. Demurrer argued by L. T. Hatfield, attorney for defendant. April 8. This case coming on regularly for hearing this day the following proceedings were had; the people being represented by deputies district attorney F. F. Atkinson, Esq., and J. W. S. Butler, Esq., the defendant being present with counsel L. T. Hatfield, Esq., and J. B. Devine, Esq.," etc. The said demurrer purported to be signed "Jesse W. Lilienthal and L. T. Hatfield, attorneys for defendant J. O'Keefe."

The affidavits of L. T. Hatfield and James B. Devine set forth that they were present at all times during the said preliminary examination of the defendant J. O'Keefe; that neither of them appeared for nor was either authorized to appear as counsel for the defendant, Western Meat Company; that at the said preliminary examination they repeatedly stated to the court and to the counsel for the prosecution that they appeared solely for the defendant O'Keefe, and did not represent any of the other defendants named in the complaint, and that said Western Meat Company was not summoned nor notified to appear at said examination, and never appeared thereat at any time, either in person or by any of its officers, employees or stockholders, or by counsel, and the said company was never arraigned by said magistrate or brought before him for examination.

The affidavit of John O'Keefe was to the effect that he was not authorized to appear for said company, that he never employed counsel and never stated to any person that he appeared or was authorized to appear, and as a matter of fact he never did appear or act for said corporation in this proceeding.

The affidavit of Leroy Hough, the vice-president and general manager of the company, recited that said company was never served with any summons or other process of law in the proceeding; that said company never at any time or in any manner authorized any person to appear for or on its behalf in said justice court, or in any court until the sixth

day of July, 1908, four days after a plea of "not guilty" had been entered in behalf of said corporation in the superior court. That on said day, affiant and the members of the board of directors of said corporation received notice that it had been arraigned on the second day of July, 1908, and a plea of "not guilty" entered therein, and thereupon said directors, by a resolution duly adopted, authorized and empowered attorneys to protect the interests of the corporation; that during the preliminary examination of said O'Keefe affiant was present and testified therein, but it was simply in obedience to a subpoena and not otherwise; that affiant was the only person authorized to employ counsel during the pendency of these proceedings, and that the said O'Keefe never had any authority to appear for or on behalf of said corporation.

In opposition to the motion the affidavits of the committing magistrate, the assistant district attorney, and of the district attorney were received in evidence.

In the first, it is denied that counsel for O'Keefe repeatedly stated that he did not appear for respondent, and it is averred that affiant has no recollection of any such statement, and during the entire course of said examination he was of the opinion that Messrs. Hatfield and Devine of Sacramento and Mr. Lilienthal of San Francisco represented all of the defendants named in the complaint and that he proceeded with the examination upon that theory; that during said examination the said L. T. Hatfield stated: "We want it distinctly understood that we are not appearing for any defendant except Mr. O'Keefe, both the Western Meat Company and Mr. O'Keefe. If there are any other defendants we would like to know it."

The affidavit of the district attorney discloses certain statements made by Mr. Devine on an application for a change of venue in the superior court of said Sacramento county, in which he referred to himself and Mr. Hatfield as the attorneys of record for the defendants at the preliminary examination, and also the transcript of certain questions asked by Mr. Hatfield of certain witnesses called by him at the preliminary examination in reference to the connection of the said Western Meat Company with the offense charged in the complaint.

The affidavit of Mr. Atkinson, the assistant district attorney, sets forth quite fully the proceedings before the committing magistrate and the superior court, detailing circumstances from which the inference might be drawn that the attorneys for Mr. O'Keefe were acting for respondent herein. But, attaching full significance to the showing made by appellant, we have simply a conflict in the evidence as to whether the Western Meat Company was actually represented by counsel at said preliminary examination. There can be no kind of doubt as to the conclusion from the said affidavits offered on the part of said company that it had authorized no one to appear in its behalf, and as a matter of law no one had any authority to represent it in said proceedings. The rule is well established, as stated in *Doak v. Bruson*, 152 Cal. 18, [91 Pac. 1001], that "in the consideration of an appeal from an order made upon affidavits, involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established." (See, also, *Henderson v. Cohen*, 10 Cal. App. 580, [102 Pac. 826].)

As the court below had the legal right to conclude that the said company was represented at the preliminary examination by no one authorized to appear as its attorney or agent, the only question remaining is whether an attorney, by his appearance for a defendant at a preliminary examination, can prevent an inquiry into his actual authority as such attorney. It seems to be the contention of the attorney general that the declarations and conduct of Messrs. Hatfield and Devine were binding upon respondent, and precluded it from showing to the contrary any want of authority. In other words, a corporation is made a defendant in a criminal case. No summons is issued and no notice is given to said corporation of the pendency of the proceedings. A preliminary examination is held, it may be without even the knowledge of the officers of said corporation, but an attorney, without authority, announces himself as the representative of the defendant. Can it be said that under such circumstances the defendant is denied the right to show that it has not been actually represented by counsel? The law is not subject to

any such reproach. This would be in violation of section 13, article I, of the constitution, providing that "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel."

The rule, founded in reason and sanctioned by the authorities, is that it is presumed that an attorney appearing and acting for a party to a cause has authority to do so, and to do all other acts necessary or incidental to the proper conduct of the case, and the burden of proof rests on the party denying such authority, to sustain his denial by a clear preponderance of the evidence. (8 Am. & Eng. Ency. of Law, p. 875.)

A case in point is *Merced County v. Hicks*, 67 Cal. 108, [7 Pac. 179]. There was no service of summons upon any of the defendants, but a demurrer was filed by Hicks and signed at his sole request by an attorney without any authority from respondents. The demurrer upon its face purported to be for all of the defendants, but the court said: "We think there was no appearance by the respondents. 'A defendant appears in an action when he answers, demurs, or gives written notice of appearance for him.' (Code Civ. Proc., sec. 1014.) But a defendant cannot be said to demur unless he does so in person or by an attorney authorized to represent him."

The cases cited by appellant sustain the position of respondent herein. For instance, in *State v. Passaic County Society*, 54 N. J. L. 260, [23 Atl. 680], it is said: "In this case the record shows that Robert I. Hopper, one of the practicing attorneys of this court, appeared and filed a demurrer to the indictment. If he had appeared, knowing that he had no authority to do so, it would have been in contempt of the trial court. His appearance was presumably lawful. Otherwise the trial court should, in all cases where a corporation appears by attorney, require him to establish his right to do so by competent evidence. Such has never been the practice. The burden is on the corporation to show that the appearance was unauthorized. As the record stands, it sufficiently appears that the defendant was in court to answer to the indictment."

Upon the affidavits and testimony thus far considered, we can entertain no doubt that the trial court was justified in its conclusion that the corporation satisfied the requirement of the rule imposing upon it the burden of proof that it was not represented at said preliminary examination, and the order must be sustained. It is only just, however, to say that at the hearing of the motion Mr. Hatfield filed a counter-affidavit in which he denied having stated in the justice court that he appeared for respondent, and he disclaimed any purpose or attempt to make it appear that he was authorized to represent, and he averred that he did not, in fact, represent, the Western Meat Company at said proceeding.

Indeed, a reasonable inference from the entire showing made and which, no doubt, was entertained by the trial court, is that the attorneys and the justice all acted in good faith, but a mistake was made by the latter in assuming that respondent was represented by counsel.

The counter-affidavit to which we have referred was inadvertently omitted from the transcript of the testimony as first certified by the trial judge and by him it was afterward allowed as an amendment to said transcript. The appeal was then pending in this court, and the contention is made that the court below was without jurisdiction to amend the transcript.

Section 1247c of the Penal Code, as added by the legislature of 1909, provides for a further transcription of the record upon suggestion to the appellate court that such action is necessary. The said section contemplates that the order shall be made by the appellate court and the additional transcription follow. The course pursued here is somewhat irregular, as, after the amendment has been made, we are asked to sanction it, but it is not claimed that said affidavit was not used on the hearing and no prejudice has resulted from the irregularity. While said amendment is not necessary for a determination of the cause, we think it should be made a part of the record, and it is so ordered.

The order setting aside the information is also affirmed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 693. First Appellate District.—June 1, 1910.]

**H. M. SHAW, Respondent, v. CITY AND COUNTY OF
SAN FRANCISCO, etc., Appellant.**

**SAN FRANCISCO CHARTER—VOID APPOINTMENT OF DEPUTY REGISTRARS—
VIOLATION OF CIVIL SERVICE PROVISIONS.**—Appointments of deputy registrars by the board of election commissioners of the city and county of San Francisco, not made from the list of civil service eligibles provided for in the charter, none of whom had taken the competitive examination provided for therein, and which were made in entire disregard of the civil service provisions of the charter, were void, and conferred no rights upon the appointees.

ID.—ACTION FOR REASONABLE SERVICES NOT TENABLE.—Such appointments being void, no action will lie in favor of the appointees to recover from the city and county the reasonable value of their services. Such an action is contrary to the settled rule in this state.

ID.—CHARTER PROVISIONS NOT ALLOWED TO BE FRITTERED AWAY.—To permit a liability to be imposed upon the city and county to pay for services rendered under appointments made contrary to the express provisions of its charter declaring the same to be void would be to fritter away the entire scheme for civil service appointments contained in the charter.

ID.—DUTY OF APPOINTEES TO SECURE VALID APPOINTMENTS—ASSUMPTION OF RISK.—The appointees were bound to see that their appointments were made according to the requirements of the charter, which they ought to have known. If they neglected this, or chose to take the hazard of accepting a void appointment, they were mere volunteers, and suffer only what they should have anticipated.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

Percy V. Long, City Attorney, and John T. Nourse, and J. F. English, Assistant City Attorney, for Appellant.

Costello & Costello, for Respondent.

HALL, J.—Plaintiff, in his own right, and as the assignee of forty-six other persons, brought an action to recover the total sum of \$5,600, as the reasonable value of services rendered by plaintiff and his several assignors, as deputy registrars of voters of the city and county of San Francisco under

appointments made by resolution adopted by the board of election commissioners of said city and county in regular session assembled. (In this opinion plaintiff and his assignors will hereafter be referred to as the plaintiffs.)

Plaintiffs recovered judgment as prayed for, and this is an appeal from such judgment, taken upon the judgment-roll.

It appears from the findings that the positions to which plaintiffs were appointed had been duly included by the civil service commissioners of the city and county within the civil service commission system, and that in accordance therewith appointments to such positions should and could only be made from the list of civil service eligibles for the class or grade to which the positions belonged. It further appears that the plaintiffs were appointed in entire disregard of the civil service provisions of the charter. None of them even took the competitive examination required by the charter, and the name of no one of said plaintiffs was upon the register or list of civil service eligibles. In fact, no attempt was made by plaintiffs or the board of election commissioners to comply with the requirements of the civil service provisions of the charter.

The civil service provisions of the charter are contained in article XIII thereof, and section 11 of said article provides that "All officers, courts, boards and heads of departments, vested in this charter with the power to appoint deputies, clerks, stenographers or employees in any of the offices or departments of the city and county mentioned in this section, shall make such appointments in conformity with the rules and provisions prescribed by this article, and any appointment not so made shall be void." The section further expressly provides that the provisions of article XIII shall apply to the board of election commissioners.

In the face of these provisions of the charter, it is not claimed by respondent that the appointments of plaintiffs were valid. On the contrary, it seems to be conceded that such appointments were void. Plaintiffs sought to recover and did recover, upon the theory that, though their appointments were void as having been made in violation of the clear and express provisions of the law, yet as they performed the services, and appellant received the benefit thereof, plaintiffs are entitled to recover the reasonable value of such services from the municipality.

To this doctrine we cannot subscribe. It is contrary to the rule laid down in this state in well-considered cases, the leading one of which is *Zottman v. San Francisco*, 20 Cal. 97, [81 Am. Dec. 96]. To the same effect are *Santa Cruz Rock Pavement Co. v. Broderick*, 113 Cal. 628, [45 Pac. 863]; *City Improvement Co. v. Broderick*, 125 Cal. 139, [57 Pac. 776]; *Times Publishing Co. v. Weatherby*, 139 Cal. 618, [73 Pac. 465]; *Fountain v. City of Sacramento*, 1 Cal. App. 462, [82 Pac. 637].

To permit a liability to be imposed upon the municipality to pay for services rendered under appointments made, as in this case, contrary to the explicit provisions of the law, and by the law declared to be void, would be to fritter away the entire scheme for civil service appointments contained in the charter. This we may not do. In *Zottman v. San Francisco*, the plaintiff sought to recover for work done on the public streets of the municipality under a contract let to plaintiff in disregard of the requirements of the law regarding such contracts. The claim that plaintiff could recover upon a *quantum meruit*, because the work had been performed and accepted, was pressed upon the court. It was held that the contractor could neither recover upon his express contract nor upon *quantum meruit*. The court said: "It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him, but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard."

So, too, in the case at bar, the plaintiffs as well as the board of election commissioners, when the appointments were made, knew or ought to have known that they were made in contravention of the provisions of the charter, and were under the law void. Plaintiffs were bound to see that their appointments were made according to the requirements of the charter. If they neglected this, or chose to take the hazard of accepting a void appointment, they were mere volunteers, and suffer only what they should have anticipated.

Respondent contends that the doctrine laid down in *Zottman v. San Francisco*, 20 Cal. 97, [81 Am. Dec. 96], has been repudiated in the later case of *Contra Costa Water Co. v. Breed*, 139 Cal. 432, [73 Pac. 189]. This latter case is peculiar in its facts, and it may be conceded that in the opinion of Justice McFarland the soundness of the rule enunciated in the *Zottman* case is questioned. But this opinion was concurred in by but one other justice, while Justice Angellotti and two other justices concurred in the judgment upon grounds not affecting the rule of the *Zottman* case. On the other hand, Chief Justice Beatty also concurred in the judgment, but took pains to affirm his adherence to the rule of the *Zottman* case, and to further show that the doctrine of estoppel against a municipality, enunciated in the opinion of Justice Cope in *Argenti v. City of San Francisco*, 16 Cal. 256, cited by respondent herein, never was concurred in by his associates, and was subsequently expressly repudiated by him in the *Zottman* case.

It thus cannot be said that the court in *Contra Costa Water Co. v. Breed* overruled the *Zottman* case.

Respondent suggests in a supplemental brief that "should this court determine this case favorably to respondent, the civil service scheme cannot be in any wise injuriously affected, for the reason that it cannot be presumed that city officials will in future perform their duties in an irregular or illegal manner."

This suggestion does not appeal to this court with much force. It occurs to us that such action would encourage disregard of the civil service provisions of the charter. The most certain way to enforce compliance with such provisions is to deny compensation out of the public funds to persons receiving such void and illegal appointments.

The judgment is reversed, with directions to the trial court to enter judgment in favor of appellant for its costs.

Cooper, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 28, 1910.

[Crim. No. 146. Second Appellate District.—June 4, 1910.]

THE PEOPLE, Respondent, v. WEBB EDWARDS, Appellant.

RAPE—SEXUAL INTERCOURSE WITH YOUNG GIRL—ERROR IN ADMITTING EVIDENCE—DISTINCT RAPE BY ANOTHER PERSON.—Upon the trial of a charge of rape by the defendant committed by sexual intercourse with a female under sixteen years of age not his wife, it was prejudicial error to admit evidence of a distinct act of rape subsequently committed by a male companion of defendant on the same day upon the prosecuting witness at a different and remote place, for the commission of which defendant was not in any way responsible.

ID.—GENERAL RULE AS TO PROOF OF OTHER OFFENSES.—It is a general rule that the prosecution cannot prove other offenses committed even by the defendant for the purpose of increasing the likelihood that he committed the offense charged, the only exception being where another offense actually tends to show the intent with which the act charged was done; but in no case has any court justified the admission of a distinct offense by another party, except in instances where the acts and declarations of conspirators are sought to be shown, though acts and declarations even of a conspirator are not admissible after the commission of the crime.

ID.—DISTINCT AND INDEPENDENT CRIME OF THIRD PARTY—ABSENCE OF CONNECTION WITH OFFENSE CHARGED.—It cannot be claimed that the acts and conduct of a third party, involving an independent and substantive crime, committed after the offense charged against defendant was completed, and at a remote place therefrom, have a logical or necessary connection with the offense charged against the defendant.

ID.—ACT OF THIRD PARTY NOT PART OF RES GESTAE.—The term "*res gestae*" signifies circumstances and declarations growing out of a main fact, which are contemporaneous with it, and serve to illustrate its character. The subsequent and independent act of the male companion of defendant is not part of the *res gestae* of the defendant's crime, and is not a necessary incident of defendant's act.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

H. T. Miller, J. R. Dorsey, and Thomas Scott, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

ALLEN, P. J.—The defendant was convicted of the crime of rape committed by reason of having sexual intercourse with a female under the age of sixteen years, she at the time not being his wife. From a judgment pronounced upon the verdict, and from an order denying a new trial, defendant appeals.

Numerous errors are assigned as grounds for reversal, but we are of opinion that the action of the trial court in admitting, over defendant's objection, evidence of the commission of another rape upon the prosecuting witness by another party on the same day, at a remote place, was erroneous and so prejudicial as to seriously affect defendant's rights. The record discloses that the defendant and another young man started to drive out into the country and overtook two young girls who were walking along the road; that these girls got into the buggy with the young men, the prosecuting witness sitting on the lap of defendant and the other girl on the lap of his companion; that during the drive out into the country defendant took improper liberties with the prosecuting witness; that after they arrived at a point near what is known as Elk Bayou, defendant's male companion and the girl who had previously been sitting on his lap got out of the buggy and went some distance therefrom; that thereupon defendant had sexual intercourse with the prosecuting witness while both parties were in the buggy; that thereafter the male companion and the other girl returned, joined the parties in the buggy, which was then driven a distance of nearly half a mile to a point on what is called Woodville road, at which point the girl who had theretofore been sitting on the lap of defendant left the buggy and the male companion also got out of the buggy and the two proceeded a short distance therefrom, where another rape was committed by defendant's male companion upon the prosecuting witness.

The record discloses that but a very small part thereof relates to incidents and transactions connected with the substantive offense with which defendant stood charged; that the major portion of the record is taken up with an account of the rape committed by the male companion of defendant upon

the prosecuting witness. Defendant objected to all of the testimony with reference to this offense of the male companion upon the ground that the same was immaterial, incompetent and irrelevant, which objection the court overruled and permitted the introduction of all the disgusting details connected with the rape of the prosecuting witness by the male companion of defendant. The information charged the defendant alone with the offense. There was no evidence offered, nor was the prosecution conducted upon the theory that there was any conspiracy or collusion between defendant and his male companion, and even had such condition been shown, all of the criminal acts of the male companion were shown to have been perpetrated long after the offense was committed with which defendant stood charged. It is established law that "the prosecution cannot prove the commission by defendant of other offenses for the purpose of increasing the likelihood that he committed the particular offense with which he is charged"; the exception to this rule being that it may be made to appear in order to show intent. In *People v. Lane*, 100 Cal. 387, [34 Pac. 859], the following rule laid down by the supreme court of Illinois is quoted and approved: "But the general rule is against receiving evidence of another offense, and no authority can be found to justify its admission, unless it clearly appears that such evidence tends in some way to prove the accused guilty of the crime for which he is on trial." And further along in the same opinion there is quoted with approval this language of the supreme court of Pennsylvania: "If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." In *People v. Williams*, 133 Cal. 168, [65 Pac. 324], Mr. Justice Temple, in speaking for the court in a case involving a similar offense, says: "In this case, as well as in any other, the prosecution must charge a specific offense, and the conviction, if one is had, must depend upon the proof of that offense alone. Other incidents are important only as tending to prove the *one* specific offense for the alleged commission of which defendant is on trial." These and many other decisions of like import all relate to the proof of substantive of-

fenses by the defendant, but in no case to which our attention has been called has any court justified the admission of a distinct offense by another party, except in instances where the acts and declarations of conspirators are sought to be shown, but acts and declarations even of a conspirator are not admissible after the commission of the crime. We are unable to see how it can be claimed that the acts and conduct of a third party, involving an independent and substantive crime committed after the offense charged against defendant was completed, and at a remote place therefrom, have a logical or necessary connection with the offense charged against defendant. There is no pretense that the defendant was guilty of any criminal act after he left the point near Elk Bayou. If the evidence discloses his guilt, it was for the crime there committed, and the admission of the evidence in relation to the conduct of his companion, for which he is not shown to have been in any sense responsible, violates, in our opinion, all the well-established rules.

The attorney general insists that these acts of the companion were part of the *res gestae*, and, therefore, admissible. While the use of the term "*res gestae*" has been criticised by eminent authority, it has grown into use as signifying circumstances and declarations which grow out of a main fact and which are contemporaneous with it and serve to illustrate its character. As said by the supreme court of Kansas in *Eagon v. Eagon*, 60 Kan. 697, [57 Pac. 942]: "*Res gestae* is matter incidental to a main fact and explanatory of it. It is made up of acts and words which are so closely connected with a main fact as to really constitute a part of it, and without a knowledge of which the main fact might not be properly understood." It is not possible for us to conceive how these acts of the male companion can be regarded as a necessary incident of the criminal act charged against the defendant. We think the action of the court in declaring before the jury, as it did by its implied declaration, that this testimony was competent and material, could have no other effect upon the minds of the jury than to lead them to the conclusion that a rape committed by the companion under the circumstances of this case tended to prove the substantive offense charged against the defendant. The conviction rests almost entirely upon the testimony of the prosecuting witness. The corrob-

orating evidence was not of such a character as to afford much aid to the jury. The defendant was shown to have been a young man of irreproachable character, who denied all of the acts charged, and these things may not be ignored in considering the probable prejudicial effect of the testimony improperly admitted.

We are of opinion that for the error above referred to the judgment and order should be reversed, and that the other errors assigned are not of such a character as to require of necessity a review as affecting the subsequent trial.

Judgment and order reversed and cause remanded for further proceedings.

Shaw, J., and Taggart, J., concurred.

[Crim. No. 145. Second Appellate District.—June 4, 1910.]

THE PEOPLE, Respondent, v. EDWARD HARRISON, Appellant.

CRIMINAL LAW—MOTION TO DISMISS APPEAL—FAILURE OF ORIGINAL RECORD TO SHOW NOTICE—ADDITIONAL RECORD.—A motion to dismiss an appeal in a criminal case cannot be granted for failure of the original record to show a notice of appeal, where an additional and supplemental record filed by leave of this court shows that such notice was actually given by the defendant in open court at the proper time.

ID.—RAPE—SEXUAL INTERCOURSE WITH YOUNG GIRL—PREJUDICE OF JUROR AGAINST CRIME CHARGED—ERROR IN OVERRULING CHALLENGE. Where in impaneling a jury upon a charge of rape in having sexual intercourse with a girl under sixteen years of age, not his wife, a juror examined as to his qualifications declared his prejudice against the crime charged, and that he would give the benefit of the doubt to the family, it was error to refuse to sustain the defendant's challenge against such juror for actual bias.

ID.—CONSTITUTIONAL RIGHT TO IMPARTIAL JURORS.—The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury guaranteed by the constitution.

ID.—KIND OF PREJUDICE NOT MATERIAL.—There is no difference to be recognized in the application of the rule, where the prejudice exists

against the defendant individually, or where a like prejudice exists on account of the offense with which he is charged.

ID.—CHALLENGE FOR ACTUAL BIAS—DUTY OF COURT.—The challenge being for actual bias, the trial court was called upon to determine the facts.

ID.—DISCRETION—QUESTION OF LAW—REVIEW ON APPEAL.—While, in passing upon actual bias, a large discretion is vested in the trial court, and its ruling is only reviewed in exceptional cases, yet when the evidence of the juror upon his examination presents to this court a question of law, the disallowance of a challenge for actual bias may be reviewed upon appeal. Where there is no conflict in the evidence presented upon the trial of a challenge for cause, the matter is resolved into a question of law reviewable upon appeal.

ID.—OPINION UPON CROSS-EXAMINATION—ABILITY TO LAY ASIDE ADMITTED PREJUDICE.—An opinion stated by the witness on cross-examination, that he could lay aside his admitted prejudice and give the defendant the benefit of a reasonable doubt, does not cause a conflict in the evidence preventing the ruling upon his admitted prejudice from being reviewed upon appeal as matter of law.

ID.—EFFECT OF DISALLOWED CHALLENGE ON PEREMPTORY CHALLENGES—DEFENDANT PREJUDICED.—Where, owing to an error in matter of law in disallowing a challenge to a juror for cause, he was compelled to exhaust one of his peremptory challenges in getting rid of the prejudiced juror, he was thereby prejudiced by the reduction in the number of the peremptory challenges which he has the right to exercise upon his mere whim or caprice.

ID.—PREJUDICIAL ERROR WARRANTING REVERSAL.—The error of the court in denying defendant's challenge for cause, which had the effect to deprive the defendant of his full right to exercise ten peremptory challenges, is so prejudicial as to warrant a reversal of the judgment and order appealed from by the defendant.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

H. T. Miller, J. R. Dorsey, and Thomas Scott, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

ALLEN, P. J.—The defendant was convicted of the crime of rape committed by reason of having sexual intercourse with

a female under the age of sixteen years, she at the time not being his wife. From a judgment pronounced upon the verdict, and from an order denying a new trial, defendant appeals.

The attorney general insists upon a dismissal of the appeal for failure upon the part of defendant to announce in open court his appeal from said judgment and order. The additional and supplemental record filed in this case by leave of court discloses that such notice was actually given in open court at the proper time.

Appellant in an extended brief specifies and presents numerous alleged errors upon the part of the trial court. A careful examination of the record does not warrant us in determining that any prejudicial error appears therein, other than the following:

One Kinkler was called as a juror and was examined in open court as to his qualifications. Upon such examination he stated that he was the father of five girls; that it would take quite a weight of evidence to overcome his prejudice against a defendant simply because he is charged with the crime of rape; that he would enter upon the trial of such a case with a certain amount of feeling against the defendant; that it would require quite an amount of evidence to remove that feeling; that such feeling would be a kind of prejudice and it would require evidence to remove that; that there would be a certain amount of sympathy go to the family; that there would have to be conclusive evidence that the defendant was innocent; that while his sympathy might not operate to the extent that he would convict a man of rape on less satisfactory evidence than he would convict him of some other crime, the juror was afraid it would be a little that way, to be honest; that he had such a prejudice against one who was charged with the crime of rape that, to an extent, it might lead him to do him an injustice; that he would always give the benefit of the doubt the other way, to the family; that the sympathy he might feel, for instance, for the small girl who it is claimed was the victim, might affect his judgment and might bias him in favor of the prosecution. And when asked by the court: "You think that would be so in any case of that character?" his answer was, "In a certain extent, it would, Judge; honest, I believe it would." And when interrogated

as to whether he could approach the decision of a question where rape was involved with the same degree of calmness which he would exercise under similar circumstances where other crimes were involved, answered: "I am afraid not; I am afraid I would be a poor juror on a case of this kind." Thereupon, the court cross-examined the juror, and after a full and complete explanation of the rights of a defendant and the duty of a juror to listen to and follow the instructions of the court, and the presumptions always resting in favor of a defendant, the juror answered that he felt he could give him the benefit of all reasonable doubt. The defendant challenged this juror for cause under subdivision 2 of section 1073 of the Penal Code, which challenge was denied.

It appears from the record that after this challenge was denied, defendant as to Kinkler exercised his ninth peremptory challenge, and later exercised his tenth and last challenge as to another juror. Thereafter, jurors Frame and Snodgrass were sworn to try the case, two other jurors were drawn from the box and sworn on their *voir dire* and one thereof, W. H. Bird, was subsequently sworn as a juror to try the cause; and the record contains the following statement: "The defendant, before the jury was completed to try the case, made and was allowed ten peremptory challenges, and requested no more."

"The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury guaranteed by the constitution." (*Lombardi v. California St. Ry. Co.*, 124 Cal. 313, [57 Pac. 68].) We do not recognize any difference in the application of the rule where the prejudice exists against a defendant individually for some particular cause, personal in its nature, or where a like prejudice exists on account of the offense with which he stands charged. The challenge being for actual bias, the trial court was called upon to determine the facts. "Under such circumstances, a large discretion is vested in the trial court and its ruling is only reviewed by this court in exceptional cases; for it is only when the evidence upon the *voir dire* examination of the juror presents to this court a question of law that an exception to the disallowance of a challenge for actual bias may be reviewed." (*People v. Flannelly*, 128 Cal. 86, [60 Pac. 671].) It will be observed that the juror Kinkler

frankly admitted that his condition of mind was such that he could not fairly and impartially try the cause. He conceded frankly that he had such bias and prejudice against anyone charged with this offense that he could not sit impartially and determine the matter with the same degree of calmness which he could exercise in cases where other offenses were charged. There is, to our mind, no conflict in the evidence upon the *voir dire* examination as to the matter of actual prejudice and bias, unless his subsequent opinion upon cross-examination, that he could give the benefit of all reasonable doubt to the defendant, could be so regarded. We regard his cross-examination in the sense of an opinion as to his own ability to set aside an admitted prejudice. The rule permitting a juror to qualify by stating that he can and will try the cause impartially, notwithstanding an opinion previously formed (Pen. Code, sec. 1076), has no application here. There being, then, in our judgment no conflict in the evidence presented upon the trial of the challenge for cause, the matter is resolved into a question of law, and is strikingly similar to that considered in *Quill v. Southern Pacific Co.*, 140 Cal. 270, [73 Pac. 991]. Nor do we regard the case of *Graybill v. De Young*, 146 Cal. 422, [80 Pac. 619], as establishing a different doctrine; for in the last-mentioned case, as said by the court in the majority opinion, "the answers of the juror tended to show that he would be bound by the evidence," and in that respect it is distinguishable from the case of *Quill v. Southern Pacific Co.*, 140 Cal. 270, [73 Pac. 991], as well as from the case under consideration. We are, therefore, of opinion that, as a matter of law, the court erred in disallowing the challenge to the juror Kinkler, and that such matter is reviewable upon this appeal. This, then, leads us to a consideration of the effect of such disallowed challenge upon the rights of the defendant in respect of his peremptory challenges. We regard *People v. Helm*, 152 Cal. 534, [93 Pac. 99], as determinative of this question. The fact that defendant was required to exercise one of his peremptory challenges in order to remove Kinkler from the panel was, in effect, restricting his peremptory challenges to nine in number. As said in the case last cited: "It makes no difference in this respect that no challenges for cause were interposed by defendant to any jurors called to the box after the exhaustion of his peremptory challenges had

been forced by the improper rulings of the court upon his challenges for cause. It may often happen that a juror most obnoxious to a defendant may successfully pass examination upon his *voir dire*. That examination may disclose no ground for the interposition of a challenge for cause. Yet there may be some reason known to the defendant which would make it most prejudicial to him that the juror should be retained. Even more, the right to exercise peremptory challenges is absolute. Such a challenge may be exercised upon the mere whim or caprice of defendant; so that again we say that any rulings of a court which compel a defendant to exhaust his peremptory challenges and force him to accept jurors after his challenges have been so exhausted, become the proper subject of review." As said by the supreme court of Ohio in the case of *Hartnett v. State*, 42 Ohio St. 578: "Where, as in this case, the accused does exhaust his peremptory challenges before the jury is impaneled, . . . it cannot be said 'no prejudice resulted to defendant from such erroneous rulings of the court.' " This case cites with approval *People v. Weil*, 40 Cal. 268, in which case it is held that the practical result of the erroneous disallowance of defendant's challenge for cause was to contract the number of peremptory challenges to which he was entitled and may have been seriously prejudicial to the defendant. This seems to be recognized in other jurisdictions and may be said to be settled law.

We are of opinion that this error of the court in denying defendant's challenge for cause had the effect to deprive defendant of his full right to exercise ten peremptory challenges and is so prejudicial as to warrant a reversal of the judgment and order.

Judgment and order denying a new trial reversed, and cause remanded for further proceedings.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 825. Second Appellate District.—June 6, 1910.]

CAROL CROUSE-PROUTY, and SIMON PROUTY, Her Husband, Respondents, v. JULIA A. N. ROGERS, and W. B. JUDSON, Appellants.

ORDER GRANTING NEW TRIAL—GROUNDS OF MOTION—GENERAL ORDER—REVIEW UPON APPEAL.—Where the grounds of a motion for a new trial were insufficiency of the evidence to justify the decision, newly discovered evidence based upon affidavits, and errors of law occurring at the trial, a general order granting the motion will not be disturbed upon appeal, unless it appears that the making of the order constitutes an abuse of discretion.

ID.—QUIETING TITLE—CONTRACT OF PURCHASE—CONFLICTING EVIDENCE—AGENCY AND TRUST FOR PURCHASER—NOTICE—NEW EVIDENCE—PROPER ORDER GRANTING NEW TRIAL.—In an action to quiet title, where conflicting titles rested upon a contract of purchase, and findings for the defendants were made upon conflicting evidence that the contract was not complied with, that the female plaintiff was a grantee of the purchaser, whose deed did not describe the land sued for, and that the female defendant's deed from the vendor and original purchaser was without notice of plaintiffs' deed, but there is evidence in the record from which the court might conclude, in its order granting a new trial to plaintiffs, that the grantee of the purchaser was a corporation which was a mere agency and trustee for the purchaser, that the defendant had actual and constructive notice of plaintiffs' deed, and also that the newly discovered evidence conflicted with its findings, the court did not abuse its discretion in granting the new trial.

APPEAL from an order of the Superior Court of Los Angeles County, granting a new trial. Chas. Monroe, Judge.

The facts are stated in the opinion of the court.

Haas, Garrett & Dunnigan, for Appellants.

O. B. Carter, and Schweitzer & Hutton, for Respondents.

SHAW, J.—Action to quiet title. Judgment went for defendants; plaintiffs moved for a new trial, which motion was granted, and defendants prosecute this appeal from the order granting the same.

The judgment was based upon certain findings of the court to the effect that the purchase price of the lot in controversy was not paid to Glassell pursuant to the contract; that the deed to plaintiff Carol Crouse-Prouty did not describe the land set out in the complaint; that at the time defendant Julia Nolan Rogers received the deed to the lot she had no notice, either actual or constructive, of the deed from the corporation to plaintiff, and that plaintiff had no claim of right, title, or interest in and to the lot in question, as to all of which findings the evidence was conflicting.

The grounds of the motion for a new trial were insufficiency of the evidence to justify the decision, newly discovered evidence embodied in affidavits used upon the hearing of the motion, and errors of law occurring at the trial. In such cases, where the order, as here, is general, this court will not disturb the ruling of the trial court unless the making of the order constitutes an abuse of discretion. (*Brooks v. San Francisco etc. Ry. Co.*, 110 Cal. 178, [72 Pac. 570]; *Cole v. Wilcox*, 99 Cal. 552, [34 Pac. 114]; *Von Schroeder v. Spreckels*, 147 Cal. 186, [81 Pac. 515].)

On December 26, 1885, Andrew Glassell, who was the common source of title, entered into a contract with Ralph and W. E. Rogers, whereby he agreed to sell and convey to them a large tract of land, which included the lot in controversy. On March 24, 1886, Ralph and W. E. Rogers transferred this agreement for purchase to a corporation known as the Garvanza Land Company, which, under the terms of the agreement, caused a portion of the land to be subdivided into lots and blocks and designated it as "Garvanza Addition No. 1," map of which was duly recorded. On June 19, 1886, the corporation, for a valuable consideration, executed a deed, which was duly recorded, to plaintiff Carol Crouse-Prouty, whereby it conveyed to her the lot in question. After the execution of this deed by the corporation, and on December 15, 1886, the corporation transferred the Glassell contract to W. F. McClure, who, on the day following, assigned it to Ralph Rogers. On July 12, 1888, Glassell executed a grant deed to Ralph Rogers of the lands described in the said contract, excepting therefrom certain tracts, which excepted lands did not, however, include the lot involved in this action. W. E. Rogers joined Glassell in the execution of this conveyance. This

deed recited payment of the consideration mentioned in the contract, and that "this deed is delivered and accepted in satisfaction of the existing obligations of the party of the first part (Glassell), by reason of said contract of December 26, 1885." On January 2, 1892, Ralph Rogers conveyed the lot in question, together with other lands, to one Conway, from whom, by mesne conveyance, defendants acquired whatever title they have to the lot. It thus appears that plaintiffs' claim of title to the lot is by virtue of the deed from the Garvanza Land Company, whose only interest in the lot was by virtue of the Glassell contract, while defendants claim under a subsequent deed made by Ralph Rogers after he had acquired title to the property by a deed executed pursuant to the Glassell contract.

The record contains evidence which tends to prove that Ralph Rogers organized the Garvanza Land Company as an agency by means whereof to more conveniently conduct the real estate business in which he was then engaged, and make sales of lands and interest owned by him; that he owned practically all of the stock and was president of the corporation; that the other directors and officers, except W. E. Rogers, who for a short period held a comparatively small amount of stock which Ralph subsequently acquired, were mere dummies; that all the persons, including the corporation, in whom the title to the property was at any time vested, held the same without consideration and as trustee for Ralph Rogers; that defendant Julia Nolan Rogers at the time she claims to have acquired the lot by purchase for a valuable consideration had actual notice of the conveyance of the lot to plaintiff Carol Crouse-Prouty, and of the fact that she claimed ownership under the deed from the corporation. Moreover, under the facts presented, the court might be justified in holding the record of plaintiff's deed sufficient to impart constructive notice. (*Rogers v. McCartney*, 3 Cal. App. 34, [84 Pac. 215].)

This and other evidence on the part of plaintiff, including a number of affidavits of newly discovered evidence presented at the hearing, tended to establish facts contrary to those found by the court, and, by reason of the granting of the motion, it must be presumed that the court arrived at the conclusion upon the hearing thereof that the evidence upon which it based the findings was insufficient, either with or without

the newly discovered evidence shown by affidavits, to support them. The record fails to disclose any abuse of discretion on the part of the court in granting the motion.

The order appealed from is, therefore, affirmed.

Allen, P. J., and Taggart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 4, 1910.

[Crim. No. 119. Third Appellate District.—June 6, 1910.]

In the Matter of the Application of DAVE MILLER for a
Writ of Habeas Corpus.

CRIMINAL LAW—MISDEMEANOR—LICENSE TAX UNDER COUNTY ORDINANCE NOT PUNISHING NONPAYMENT—PUNISHMENT UNDER PENAL CODE—HABEAS CORPUS.—The fact that a county ordinance imposing a license tax to be paid to the tax collector on the business of raising, grazing, herding and pasturing cattle within the county does not denounce the nonpayment of the tax as a crime, cannot entitle one charged with such nonpayment as a misdemeanor under section 435 of the Penal Code to be released on *habeas corpus*.

ID.—CONSTRUCTION OF PENAL CODE—"LAW OF STATE"—ORDINANCES INCLUDED.—Under section 435 of the Penal Code, providing that "Every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law is guilty of a misdemeanor," the words "any law of this state" include ordinances of counties and municipalities."

ID.—LICENSE TAX ON BUSINESS OF RAISING, GRAZING, HERDING AND PASTURING CATTLE NOT FOR REVENUE—POLICE POWER—DISCRETION.—A tax on the business of raising, grazing, herding and pasturing of cattle within the county, imposed by a county ordinance, is not a tax for the purpose of raising revenue; but it is a proper exercise of the police power of the county which is extensive, and in the exercise of which a very wide discretion as to what is needful and proper is necessarily committed to the legislative body in which the power to make such laws is vested.

ID.—MANNER AND EXTENT OF REGULATION—POWER OF COURTS.—The manner and extent of such regulation are primarily legislative ques-

tions, and the courts will not interfere unless it clearly appears that the legislative body has under the guise of regulation imposed an arbitrary or unreasonable burden upon the use of property or the pursuit of an occupation. It is a judicial question whether a particular regulation of the right to pursue a lawful business is a valid exercise of the police power, though the power of the court to declare any regulation invalid will be exercised with the utmost caution.

ID.—ORDINANCE MUST BE SHOWN TO BE UNREASONABLE.—An ordinance must be clearly shown by the attacking party to be clearly unreasonable to authorize the interference of the court.

ID.—PRESUMPTION OF REASONABLENESS.—The presumption is in favor of the reasonableness of the license tax imposed by a county ordinance. The county in imposing it is not limited to the exact amount of the expense as it may subsequently develop. What expense the county will be put to in the enforcement cannot be determined by the expense of the ordinance itself.

ID.—EVIDENCE SHOWING REASONABLENESS.—Where the evidence adduced shows that the amount to be realized from the tax on all owners of cattle is comparatively small, and appears reasonable in view of the probable expense to the county that may be caused by the business, even though the amount of such expense is not definitely stated, it cannot be said the presumption is overcome that such expense may approximate the amount of the tax, or that the board was not entirely justified in concluding the tax was proper to meet a reasonable anticipated expense.

ID.—HABEAS CORPUS—VOLUNTARY AND INVITED SURRENDER TO SHERIFF—ABSENCE OF CONTROL BY SHERIFF—DISMISSAL OF WRIT.—Where the return of the sheriff to the petition for the writ of *habeas corpus* shows that the petitioner came to him and voluntarily surrendered himself to the sheriff, who did not take control over him, it sufficiently appears that if at the very moment when the writ was applied for he was in the custody of the officer, it was only momentary, and invited to obtain a decision on the validity of the ordinance. This practice is not within the spirit of the *habeas corpus* act, and cannot be countenanced by the court; and the writ will be dismissed on that ground.

PETITION for writ of *habeas corpus*.

The facts are stated in the opinion of the court.

Edward F. Treadwell, for Petitioner.

Pat R. Parker, for Respondent.

BURNETT, J.—The petitioner was charged in the justice court of Bridgeport township, county of Mono, with misdemeanor in having commenced and carried on within said county “the business of raising, grazing, herding and pasturing cattle without having taken out or procured a license therefor, as required by an ordinance of the board of supervisors of said county.”

The said ordinance requires on the part of everyone engaged in such business the payment to the tax collector of the sum of seven cents for each cow, heifer, bull or bullock owned by, in the possession or under the control of such person and used in such business in Mono county.

It is claimed that petitioner is entitled to his discharge for two reasons: First, the ordinance does not provide that the act complained of shall be a crime; and secondly, the ordinance is “unreasonable, unconstitutional and void, and was not passed for the purpose of regulating the business therein referred to, but was passed solely for the purpose of raising revenue.”

The ordinance does indeed omit to denounce as a crime the failure to secure said license, but petitioner was amenable to prosecution by virtue of section 435 of the Penal Code, providing that “Every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor.” It has been held by the supreme court that “Any law of this state” includes ordinances of counties and municipalities. (*Ex parte Christensen*, 85 Cal. 208, [24 Pac. 747]; *Ex parte Mansfiels*, 106 Cal. 400, [39 Pac. 775]; *Ex parte Bagshaw*, 152 Cal. 701, [93 Pac. 864].)

The second ground of attack is equally untenable. It is well settled that the “police power, the power to make laws to secure the comfort, convenience, peace and health of the community, is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for the purpose is necessarily committed to the legislative body in which the power to make such laws is vested.” (*Ex parte Whitwell*, 98 Cal. 73, [35 Am. St. Rep. 152, 32 Pac. 870].)

“The manner and extent of such regulation are primarily legislative questions, and the courts will not interfere unless it clearly appears that the legislature has, under the guise of regulation, imposed an arbitrary or unreasonable burden upon the use of property or the pursuit of an occupation.” (*County of Plumas v. Wheeler*, 149 Cal. 762, [87 Pac. 911].)

“It is always a judicial question whether a particular regulation of the right to pursue a useful business is a valid exercise of the police power, though the authority of the courts to declare any regulation invalid will be exercised with the utmost caution. An ordinance must be clearly shown by the attacking party to be obnoxious and unreasonable to authorize the interference of the court.” (*In re McCoy*, 10 Cal. App. 116, [101 Pac. 419].)

And, as stated in *County of Plumas v. Wheeler*, 149 Cal. 762, [87 Pac. 911]: “It is to be remembered that the presumption is in favor of the reasonableness of the charge, and that the county is not limited to the exact amount of the expense, as it may subsequently develop. ‘The municipality is at liberty to make the charge large enough to cover any reasonable anticipated expense.’ (*Atlantic etc. Tel. Co. v. Philadelphia*, 190 U. S. 160, [23 Sup. Ct. Rep. 817].) . . . What expense the county will be put to in the enforcement of the ordinance cannot be determined from an inspection of the ordinance itself. . . . To arrive at the amount of such expense it would be necessary to consider the topographical conditions of the county, the extent of the industry as practiced there, the effect of the industry on the roads, trails and other public property of the county, the probable cost of prosecutions for violations of the ordinance and any other matters having a reasonable tendency to indicate the cost to which the county would be subjected by the business sought to be regulated.” It was there held that a tax of ten cents per head upon sheep and lambs in the absence of evidence as to cost of regulation could not be adjudged unreasonable.

Some evidence was taken in the matter before us, but it cannot be said that it clearly appears therefrom that the tax in question is unreasonable and oppressive. The amount realized from the license is comparatively small and the showing made by petitioner falls far short of that considered by this court in the *McCoy* case (10 Cal. App. 116, [101 Pac. 419]).

The amount of tax upon all the owners of the cattle does not exceed—so it is admitted—the sum of \$700 a year and some years it is much less.

This certainly appears quite reasonable in view of the probable expense to the county that may be caused by the business, and while the evidence as to this is unsatisfactory and indefinite, it cannot be said that the presumption is overcome that said expense may approximate the amount of the tax, or that the board of supervisors was not entirely justified in concluding that the tax was proper to meet “a reasonable anticipated expense.”

But there is another reason why the application should be denied, and that is found in the return of the sheriff, “That on November 1, 1909, the said Dave Miller did come to me as said sheriff, and state that he desired to surrender himself to my custody, and release his bail, and whatever custody or control I now have is solely under this surrender. Upon the said Dave Miller thus surrendering himself I did not assume actual custody or control of the person of the said petitioner, and he was permitted his own recognizance, and has never by me been in restraint or jeopardy.” It thus appears that, if at the very moment the petitioner applied for the writ he was in the custody of the officer it was only momentary and voluntary, and invited for the purpose of obtaining a decision as to the validity of said ordinance. This practice is said to be not within the spirit of the *habeas corpus* act, and not to be countenanced by the courts. In the case of *In re Gow*, 139 Cal. 243, [73 Pac. 145], the practice is condemned in the following language: “Our conclusion is that such a practice ought not to be countenanced, and hereafter the court will make strict inquiry in this class of cases whether the alleged imprisonment is actual and involuntary, and if it is found to be, as in this case, a merely nominal restraint, voluntarily submitted to for the purpose of making a case, the proceeding will be dismissed.”

For the foregoing reasons, the writ is discharged and the proceeding dismissed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 126. Third Appellate District.—June 18, 1910.]

THE PEOPLE, Respondent, v. RAFAELE PETRUZO, Appellant.

CRIMINAL LAW—MURDER—SUPPORT OF VERDICT.—*Held*, that the evidence is clear and convincing that the defendant charged with murder was justly convicted of murder in the first degree; that the defendant may consider himself fortunate that the jury fixed the penalty at life imprisonment, instead of leaving the severer penalty to be imposed by the court; that there is no pretense of excuse or justification for the homicide; and that the case for the people rested upon the dying declaration of the deceased, the testimony of eye-witnesses to the shooting, and the defendant's attempt to escape from jail after his arrest.

ID.—DYING DECLARATION OF AUSTRIAN—INTERPRETER—TRANSLATION BEFORE SIGNATURE—HEARING IN ENGLISH UNDERSTOOD—ADMISSION.—Where the dying declaration of the deceased was first given in the Austrian language to an interpreter, and it was formally written down in English, and read to and understood by him before signing it, and he had first been informed by the attending physician that he would die, and the declaration stated that it was made in fear of death, and believing that he was about to die, and stated the details of the shooting by defendant and his companion, and no objection was made thereto, it was properly admitted.

ID.—TESTIMONY OF PHYSICIAN—CERTAINTY OF DEATH—OPINION—POINTING OUT SHOOTING PARTIES.—Where the attending physician, before the dying declaration was admitted, testified that he told deceased, through another party, that he would die, and when his opinion was asked as to his living or dying at that time, stated, over objection, that when he so told the deceased, his opinion was that he would certainly die, the answer was without prejudice. He further testified that when defendant and his companion were brought before deceased he pointed them out as the parties who did the shooting.

ID.—CROSS-EXAMINATION OF PHYSICIAN—SPEAKING THROUGH INTERPRETER—INCOMPETENT HEARSAY.—Where the physician testified on cross-examination that all he had to do with the defendant was done through the interpreter, and the interpreter only spoke to him, his testimony as to what the interpreter said to him was incompetent hearsay.

ID.—SETTLED RULE—INCOMPETENT EVIDENCE—NECESSARY TRANSLATION. It is a well-settled rule that a witness is incompetent to testify to a declaration made by a party when it is necessary to have it translated before it can be understood by the witness. Such testimony

is clearly hearsay, as the witness necessarily testifies to what the interpreter declares the other party said.

ID.—WAIVER OF OBJECTION—MOTION TO STRIKE OUT.—Where no objection was taken to the original evidence of the physician that he informed the deceased through another party that he could not live, objection to such evidence is waived and cannot be urged for the first time on motion to strike it out.

ID.—TENABLE TESTIMONY AS TO POINTING OUT PARTIES—SUBSTANCE OF DYING DECLARATION—EVIDENCE AS TO USE OF ENGLISH.—The testimony as to the pointing out by the deceased of the parties who shot him, when brought before him, was tenable as proving by ocular demonstration the substance of his dying declaration. Other witnesses further testified that he identified them in the use of the English language.

ID.—FIRING OF FATAL SHOT—DISAGREEMENT OF WITNESSES IMMATERIAL—AIDING AND ABETTING.—It is immaterial that all the witnesses did not agree that defendant alone fired the fatal shot, since, whether he did so or only aided and abetted in the consummation of the crime, there was ample evidence, on either theory, to justify the conviction of the defendant.

ID.—DISTRICT ATTORNEY NOT BOUND TO ELECT—PROVINCE OF JURY.—The district attorney was not required to elect one or the other of these positions on which to base his claim for a verdict. His duty was done when he presented the evidence; and it was for the jury, under proper instructions, to follow the witnesses whose testimony carried conviction. In such case, the witnesses testified to only one transaction and one offense, and under the law he was a principal, and could be convicted of murder under either contingency.

ID.—DECLARATION ABOUT SHOOTING DAY AFTER HOMICIDE.—PART OF RES GESTAE.—While it is true that the facts, circumstances or declarations which grow out of the principal fact and serve to illustrate, qualify or explain it constitutes the *res gestae*, still that term is not so comprehensive as to include declarations made on the day following the homicide and many hours thereafter, as to what was then said about the shooting which took place the night before.

ID.—INSTRUCTION AS TO AIDING AND ABETTING “UNLAWFUL ACT.”—An instruction that if the jury “believes, upon the evidence, to a moral certainty and beyond a reasonable doubt that defendant was present aiding and abetting in the commission of an unlawful act, and that in the commission of said unlawful act deceased was killed, it will be your duty to bring in a verdict of guilty of murder in the first degree,” was abstractly erroneous; but where the only “unlawful act” proved is the deliberate attempt to take the life of the deceased, unless there be some evidence of an attempt to commit robbery, the instruction is obviously without prejudice.

ID.—INSTRUCTION ABSTRACTLY ERRONEOUS NOT ERRONEOUS IN FACT.—An instruction may be abstractly erroneous as a general proposition

and yet not erroneous when considered in connection with the particular case and the facts to which it relates.

ID.—INSTRUCTION OF COURT AS TO “UNLAWFUL ACT”—AIDING AND ABETTING MURDER.—That the court intended by the words “aiding and abetting an unlawful act,” to refer to the act of murder, is shown by an instruction given at defendant’s request, that “it must be proved to a moral certainty and beyond all reasonable doubt that the person charged as an aider and abetter of his malice aforethought was present, aiding and abetting his principal in the act of taking the life of the deceased,” and that otherwise “you cannot convict him of murder.”

ID.—INSTRUCTIONS AS TO “MOTIVE.”—The court did not err in an instruction that if the jury were satisfied beyond a reasonable doubt that the crime of murder has been committed and that defendant is guilty thereof, “then the motive for its commission is unimportant and not material.” But that the court did not minimize “motive” appears from another instruction that the absence of motive “is a circumstance in favor of innocence,” and that when there is “reasonable doubt as to who committed it, affords a strong presumption of innocence.”

ID.—INSTRUCTION AS TO ATTEMPT TO ESCAPE NOT PREJUDICIAL.—Where there was evidence that after the arrest of the defendant, while he was in the county jail, he attempted to escape, an instruction to the jury that if they found this to be true from the evidence, “that fact alone is not evidence of guilt, but it is a circumstance that the jury may well consider in determining the guilt or innocence of the defendant,” is not prejudicial to the defendant from the use of the word “well,” but it is more favorable to defendant than he would expect, in declaring that the attempt to escape, “of itself, is not evidence of guilt,” but of this defendant appealing cannot complain.

ID.—INSTRUCTION AS TO GUILT FOLLOWING INTENTION TO KILL NOT PREJUDICIALLY MISLEADING.—An instruction that “every person is presumed to intend what his acts indicate his intention to have been, and if you find from the evidence beyond a reasonable doubt that defendant fired a loaded pistol at the deceased and killed him, the law presumes that defendant intended to kill the deceased, and unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless,” though it was error to instruct the jury that guilt would follow from such intention, yet, in view of the facts and circumstances of the case, and the other instructions, the jury could not have been misled or prejudiced by the instruction.

ID.—REQUEST PROPERLY REFUSED—ABSENCE OF CONSPIRACY—DOUBT AS TO FIRING FATAL SHOT—OMISSION OF AIDING AND ABETTING.—A requested instruction by defendant that “if a person is killed by a bullet fired from a pistol, and two persons each at the same time

fire loaded pistols at him, and one of the persons is on trial and there is no conspiracy proved between the two persons who fired, and the jury are in doubt as to which shot killed the deceased, the defendant is entitled to the benefit of that doubt, and should be acquitted," was properly refused as precluding the jury from considering the theory that the defendant was an aider and abetter, although there might be no conspiracy between them.

ID.—REQUESTS COVERED BY CHARGE.—It was not error to refuse requested instructions, where the principles embodied therein, so far as correct, were covered by the instructions given by the court in its charge.

APPEAL from a judgment of the Superior Court of Plumas County, and from an order denying a new trial. J. O. Moncur, Judge.

The facts are stated in the opinion of the court.

L. N. Peter, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

BURNETT, J.—The evidence is clear and convincing that defendant was justly convicted of murder in the first degree. Indeed, he may consider himself fortunate that the jury fixed the punishment at life imprisonment instead of leaving the severer penalty to be imposed by the court. There is no pretense of excuse or justification for the homicide, and the showing in behalf of defendant was meager and inconsequential, directed to the contention that he was somewhat under the influence of liquor, together with certain circumstances related by two or three witnesses tending to create a suspicion that a party not arrested may have committed the crime. The defendant did not take the witness-stand, and, as far as the record shows, offered no explanation of the affair and made no denial of the charge, except what is implied in his plea of "not guilty."

The case for the people rested upon the dying declaration of the deceased, the testimony of eye-witnesses to the shooting, and the defendant's attempt to escape from jail after his arrest.

The tragedy occurred after dark on a mountainous trail on the north fork of Feather river, while a party of seven Italians, including appellant, and a party of five Austrians, including the deceased, were returning to their respective camps from a Sunday afternoon visit to a saloon about two miles from the line of the Western Pacific railroad, then in course of construction. The deceased, one Sam Radich, and another member of the Austrian party, named Peter Sunajko, were shot at the same time and both died the following day.

The said dying declaration was in writing, signed by the deceased, and in the following language: "Long Bar, California, 30th, 1908. Being in the fear of death and believing I am about to die, I make the following statement: That I was shot at by De Carlo Antonino and Raphael Petruzo and hit in the abdomen by a bullet from a revolver. This occurred at a point on the river trail near Long Bar, Plumas county, California, on November 29th, 1908, about 6:60 p. m., Peter Sunajko was coming to my assistance and was shot in the back."

The members of the said Austrian party related, in somewhat broken English, the incidents of the homicide, from which it appears that they passed the party of Italians on the trail, greeting the latter in a friendly manner. Shortly afterward some shots were fired from the rear but without effect, and then, in the language of one of the witnesses: "After that two shots come, them two fellows, Raphael Petruzo and Spenelli. They come with a gun right in the hand. I say to Shorty, 'Where you going to, boys?' I call Spenelli Shorty. He never tell me nothing, just pass me. They shoot Sam Radich right there by me, that man was in the lead. All these men were there at the time the shooting took place. These two had two revolvers in their hands. They were using them. They were shooting men with the revolvers."

Another one testified: "I saw these two fellows [pointing to Spenelli and Petruzo] shoot. Antonio Spenelli and Raphael Petruzo both had guns in their hands. None of these Austrian boys did anything at the time of the shooting. When Spenelli had the gun, he was in the middle and shoot Sam Radich. Petruzo was going along the front shooting too."

The dying declaration was admitted in evidence without objection, but prior to its introduction, Dr. A. S. Bradshaw tes-

tified that he treated Radich for the wound, which was in the lower right-hand portion of the abdomen, "in a place liable to produce death. He was suffering a good deal of pain when I was called upon. I informed Radich that he would die." He was then asked the question: "From your experience in seeing persons wounded, what was your opinion as to his living or dying at that time?" The defendant objected "on the ground that it is not pertinent or material to the case, the opinion is absolutely immaterial for any purpose that I can see, the question so far as this witness goes is whether he lived or died." It is perfectly apparent, however, that if defendant was technically correct in his position, the ruling of the court in permitting the question to be answered was entirely without prejudice, as the doctor had quite positively declared his opinion when he stated to the deceased "that he would die." Considering, also, the nature of the wound, there could be no difference of opinion as to its probable outcome. The doctor proceeded to state: "At the time I told him he was going to die, my opinion was then he would certainly die. I think I informed him through another party at the time they were brought in before he made any statement. I told them to tell him he couldn't get well, he ought to tell the truth. I think these parties were brought before him at the time. I think they were all lined up before the bed where he could see them all. When these parties were brought before Sam Radich he pointed out two who he said were shooting at him. Their names were Petruzo and De Carlo." On cross-examination he testified: "All that I had to do with him was done through an interpreter and the interpreter spoke to him." The defendant then moved "to strike out all the testimony of Doctor Bradshaw as to anything connected with a dying declaration on the ground that it appears to be irrelevant, immaterial and incompetent, no proper foundation laid for its introduction, it being apparent the witness himself doesn't know what statement the man made."

It is, of course, well settled that a witness is incompetent to testify to a declaration made by a party when it is necessary to have it translated before it can be understood by the witness. It is clearly hearsay, as the witness necessarily testifies to what the interpreter declares that the other party said. (*People v. Ah Yute*, 56 Cal. 119; *People v. John*, 137

Cal. 220, [69 Pac. 1063].) But here the doctor gave the testimony without objection after stating that his communication with the wounded man was through other parties. The defendant was therefore informed of the infirmity which he afterward urged in support of his motion, and he should have objected if he desired to have the testimony withheld from the jury. "An objection to testimony as hearsay and incompetent cannot be taken for the first time by a motion to strike out." (*People v. Samario*, 84 Cal. 484, [24 Pac. 283]; *People v. Nelson*, 85 Cal. 425, [24 Pac. 1006].) The ruling of the court could be supported also upon other grounds, if required. For instance, the physician testified that the deceased "pointed out" the defendant and another person as those who had shot him. The purpose for which the various persons were brought into the room could hardly be misunderstood, and, under the circumstances, the testimony of the physician related to an exoteric physical manifestation rather than to the declarations of the wounded man. It is also true that this testimony amounted to nothing more than a repetition of the written declaration which was translated so as to be understood by Radich before he signed it. Besides, W. A. Look testified that he was present at the time and Radich identified the two men in English. Franklin H. Smith, an officer, also testified: "I spoke to Sam Radich at this time in English. He seemed to understand me. I asked him if he was sure that this was the man that shot him, to make no mistake about it, he was about to die and I wanted him to be sure and make no mistake as to the identity of the men. He said that was the man that shot him, and that other man shot too. He pointed to Petruzo as the man that shot him. De Carlo was the man that was also pointed out as the man that also shot." If the said ruling, therefore, had been erroneous, it would simply constitute error without prejudice.

The same suggestions will apply to the ruling in relation to the similar testimony of the witness Cleveland, who prepared the said written dying declaration. It is true, that one Marcus testified in regard to the identification that "then he [Officer Smith] bring them three together after this, they point them out. Sam Radich pointed these two men out here [pointing to Spenelli and De Carlo]. I don't know whether they gave their names at the time they were pointed

out. Peter gave his name; Sam gave his name to these two men that they both shot at him. Sam Radich picked out the two men that shot at him at that time." The jury probably concluded that the witness was mistaken as to the two men identified by Radich, but at any rate, the testimony of the other witnesses and the statement in the said dying declaration were positive and overwhelming as to the identification of the defendant as one of the parties participating in the homicide. It is entirely immaterial that the witnesses did not all agree as to whether defendant alone fired the fatal shot or aided and abetted in the consummation of the crime, since there was ample evidence on either theory to justify the conviction. Nor was the district attorney required to elect one or the other of these positions upon which to base his claim for a verdict. His duty was done when he had presented the evidence. It was for the jury, under proper instructions, to follow the witnesses whose testimony carried conviction. The case is not like those where the evidence tends to connect the defendant with separate offenses. An example of this latter character is found in *People v. Williams*, 133 Cal. 165, [65 Pac. 323], where the evidence disclosed many separate acts of intercourse by the defendant with the prosecutrix, and it was properly held that the main charge relied upon for a conviction should be selected and the defendant should be notified thereof at the beginning of the trial. After stating that the court below had charged the jury to the effect that if they believed that defendant had had sexual intercourse with the prosecutrix at any time within three years before the finding of the indictment, she being under the age of sixteen, they must find him guilty, the supreme court says: "The jury were not even told that they must all agree that some specifically described act had been performed. A verdict of guilty could have been rendered under such an instruction, although no two jurors were convinced beyond a reasonable doubt, or at all, of the truth of the charge, as to any one of these separate offenses." But in the case at bar the witnesses testified to only one transaction and one offense. Under the law the defendant was a principal in either of the contingencies to which we have referred, and he could justly be convicted of the charge of murder, although some of the jurors may have believed

that he personally fired the fatal shot, while others were convinced that he was an aider and abetter in the crime. However, if it were necessary to uphold the verdict, we should be guided by the presumption that all the jurors adopted the same theory.

It can hardly be seriously contended that the court committed error in sustaining the district attorney's objection to a question asked of the witness Petrino as to a conversation he had with one Mangano. The question was: "Did he say anything to you about any shooting the night before?" It is true that "the facts, circumstances or declarations which grow out of the principal fact in question which are contemporaneous with it and serve to illustrate, qualify or explain it constitute the *res gestae* (*Gillam v. Sigman*, 29 Cal. 638)," and for that reason are admissible, but the term "*res gestae*" is not so comprehensive as to include declarations made upon the day following and many hours after the homicide.

The court gave this instruction to the jury: "You are instructed that if you believe upon the evidence to a moral certainty and beyond a reasonable doubt that the defendant was present, aiding and abetting in the commission of an unlawful act, and that in the commission of said unlawful act Sam Radich was killed, then it will be your duty to bring in a verdict of guilty of murder in the first degree." Abstractly considered, this is manifestly an erroneous statement of the law. Subdivision 2 of section 192 of the Penal Code provides that a person is guilty of involuntary manslaughter where death results, "in the commission of an unlawful act not amounting to a felony," and the aider and abetter can be guilty of no greater offense than the principal. Indeed, the instruction is accurate only as applied to certain felonies. (Pen. Code, sec. 189.) But this instruction, as others, must be considered in view of the undisputed evidence in the case. (*People v. Piner*, 11 Cal. App. 542, [105 Pac. 780]; *People v. Whalen*, 154 Cal. 475, [98 Pac. 194].) The only unlawful act of which there is a particle of evidence is the deliberate attempt to take the life of Radich and his associates, unless it may be held that there is some evidence of an attempt to perpetrate robbery, and this latter contingency would bring

the instruction within the contemplation of the statute. The instruction was, of course, intended to present the law applicable to a certain feature of the case disclosed by the evidence, and it must have been so understood by the jury. It is probably capable of the interpretation put upon it by appellant when he says: "The court in effect tells the jury that if they believe from the evidence that the defendant was present and abetting some other person in the shooting of wild game out of season, or any other trivial misdemeanor, and that in the commission of such an unlawful act Sam Radich was accidentally killed, the defendant would be guilty of murder in the first degree." But if the instruction had been given in so many words it would have been manifestly without prejudice, as there was no evidence of such hypothetical case.

In *People v. Whalen*, 154 Cal. 474, [98 Pac. 194], the supreme court, referring to a certain instruction, said: "Upon the other proposition, it may be conceded that if the instruction is taken alone, without reference to the facts of the case or the crime involved, and as an abstract proposition, it would be erroneous. . . . But an instruction may be incorrect as an abstract or general proposition and yet not erroneous when considered in connection with the particular case and the facts to which it relates." Here the unlawful act to which the court referred is pointed out in another instruction given at the request of defendant: "You are instructed that every defendant on a trial for homicide is to be judged according to his own intent, and where he is charged as an aider and abetter, he is to be tried according to the intent with which he may have participated. It must therefore be proved to a moral certainty and beyond all reasonable doubt that the person charged as an aider and abetter, of his malice aforethought was present, aiding and abetting his principal in the act of taking the life of the deceased. Unless you are convinced to a moral certainty and beyond all reasonable doubt that there existed in the mind of the defendant the intent to unlawfully take the life of Sam Radich, you cannot convict him of murder."

There is no error in the following instruction: "If you are satisfied to a moral certainty and beyond a reasonable doubt that the crime of murder has been committed, and there is

evidence sufficient to satisfy you to a moral certainty and beyond a reasonable doubt that defendant is guilty thereof, then the motive for its commission is unimportant and not material." It was simply equivalent to a direction that the jury might convict the defendant of murder if they were satisfied of his guilt, although no motive for the crime was disclosed. This cannot be questioned. As stated in *People v. Owens*, 132 Cal. 471, [64 Pac. 771]: "While the motive for the commission of the homicide is not plainly manifest from the evidence, yet the establishment of a motive is not at all essential as an element necessary to justify a conclusion. The presence or absence of motive is simply a circumstance in each particular case, sometimes weak and sometimes strong, going to the question of guilt or innocence. (*People v. Durrant*, 116 Cal. 179, [48 Pac. 75].)" That the court could not have been understood as minimizing or ignoring the importance of the question of motive is shown by this instruction given at request of defendant: "You are instructed that if the evidence fails to show any motive on the part of the accused to commit the crime charged, this is a circumstance in favor of his innocence which the jury ought to consider, together with all the other facts and circumstances, in making up their verdict. The absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence."

There was evidence that after the arrest and while the defendant was in the county jail he made an attempt to escape. The jury were instructed that if they found this to be true from the evidence, "that fact of itself is not evidence of guilt, but it is a circumstance that the jury may well consider in determining the guilt or innocence of the defendant." The particular objection is to the use of the word "*well*," but it is apparent that if the jury should consider it at all, they might *well* consider it. It cannot be said that it is an instruction as to a matter of fact or that it contains anything indicating a purpose to throw "the influence of the court into the balance against the defendant." A similar instruction was approved in the case of *People v. Strong*, 46 Cal. 302, and *People v. Welsh*, 63 Cal. 167. The instruction is probably more favorable to defendant than he could ex-

pect, since the court declared that the attempt to escape "of itself is not evidence of guilt," but of this appellant cannot complain.

In view of the facts and circumstances of the case, the jury could not have been misled by the following instruction: "You are instructed that every person is presumed to intend what his acts indicate his intention to have been; and if you find, from the evidence, beyond a reasonable doubt, that the defendant fired a loaded pistol at the deceased and killed him, the law presumes that the defendant intended to kill the deceased, and unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless." A similar instruction was approved in *People v. Langton*, 67 Cal. 427, [7 Pac. 843], and *People v. Bushton*, 80 Cal. 162, [22 Pac. 127]. It was, however, condemned in *People v. Newcomer*, 118 Cal. 263, [50 Pac. 405], *People v. Solani*, 2 Cal. App. 225, [83 Pac. 281], and *People v. Grill*, 3 Cal. App. 514, [86 Pac. 613]. But in the first two of these the defendant claimed self-defense, and there was evidence in support of it. Hence, while there was no controversy as to the intention to kill, it was error to instruct the jury that guilt would follow from such intention.

In the Grill case the defense was based upon the claim of accidental homicide, and the defendant so testified. Under the peculiar facts it was held that the presumption that a person intends the natural consequences of his act must give way to the presumption of innocence. It is worthy of note, however, that in the Newcomer case the court declared its indorsement of the position that an intention to kill would be inferred from "the shooting of the deceased with a pistol," and in the Solani case it is said: "The shooting with a pistol would naturally indicate intent to kill, and would be sufficient proof of such intent if there was no other proof tending to show that he did not intend to kill." Here, as we have seen, the concluding portion of the said instruction which was the subject of animadversion in the cases cited by appellant is entirely without prejudice in view of the evidence and other instructions. (See *People v. Besold*, 154 Cal. 363, [97 Pac. 871].)

The court refused the following instruction requested by defendant: "You are instructed that if a person is killed by

a bullet fired from a pistol, and two persons, each at the same time, fire loaded pistols at him, and one of the persons who fired is on trial, and there is no conspiracy proven between the two persons who fired, and the jury are in doubt as to which shot killed the deceased, the defendant is entitled to the benefit of that doubt and should be acquitted." The instruction would have precluded the jury from considering the theory that defendant was an aider and abetter, although there might be no conspiracy, and for that reason it was properly rejected. In the discussion of a somewhat similar instruction in the case of *People v. Woody*, 45 Cal. 289, the contingency that we have just suggested seems to have escaped the attention of the court. It certainly would be a reproach to the law if it countenanced the doctrine that where A and B deliberately and unlawfully fire at C with intention to kill him, and one shot takes effect causing his death, but it is uncertain whether A or B fired it, neither can be convicted of murder unless a conspiracy should be shown between them. In any rational view, each must be considered as aiding and abetting the other, and both responsible for the homicide.

Complaint is made of the action of the court in refusing some other instructions, but the principles embodied therein, as far as they were correct and pertinent, were covered by the instructions given.

It may not be amiss, in conclusion, to repeat the suggestion, which has been given substantially in other opinions of appellate courts, that if the district attorney in every criminal trial would carefully prepare and formulate the various principles of the law involved in the evidence presented on behalf of the people, scrupulously adopting the form of statement that has been approved by the supreme court in its latest utterances, and the trial court would adopt this, together with whatever pertinent and correct instructions may be requested by defendant, as its charge to the jury, only supplying what may seem necessary in the interest of justice, the probability of a reversal of a righteous verdict would be greatly reduced.

The judgment and order are affirmed.

Hart, J., and Chipman, P. J., concurred.

[Civ. No. 854. Second Appellate District.—June 13, 1910.]

JOHN H. DAWSON, Petitioner, v. SUPERIOR COURT OF THE COUNTY OF KINGS, etc., and JOHN G. COVERT, as Judge Thereof, Respondents.

CITIES ORGANIZED UNDER MUNICIPAL CORPORATIONS ACT—SUBORDINATION TO GENERAL LAW IN MUNICIPAL AFFAIRS.—Cities organized under the municipal corporations act are subordinate to the general law with reference to municipal affairs.

CITIES EXEMPT FROM CONTROL OF GENERAL LAW IN MUNICIPAL AFFAIRS. Under section 6 of article XI of the constitution of this state, as amended in 1896, there are but two classes of municipal corporations exempt from the control of general law in municipal affairs, comprising those cities organized by special legislative charter prior to the adoption of the constitution of 1879, and cities operating under a freeholders' charter under that constitution.

ID.—JURISDICTION OF ELECTION CONTESTS UNDER MUNICIPAL CORPORATIONS ACT NOT EXCLUSIVE—CONCURRENT JURISDICTION OF SUPERIOR COURT.—The jurisdiction of election contests conferred upon the common council of cities, organized under the municipal corporations act to hear and determine election contests, is not exclusive, but is merely concurrent with that conferred upon the superior court by the constitution and laws of the state.

ID.—GENERAL RULE—EXCLUSIVE JURISDICTION NOT INFERRED.—Where jurisdiction is conferred upon a court or body to exercise judicial functions, exclusive jurisdiction is not to be inferred, and is only to be so regarded where the language is so plain as to show the legislative intent in that regard.

APPLICATION for writ of prohibition to the Superior Court of Kings County. John G. Covert, Judge.

Maurice E. Power, Dixon L. Phillips, and J. L. C. Irwin, for Petitioner.

H. Scott Jacobs, and Choynski & Humphreys, for Respondents.

THE COURT.—This application as presented is based upon the theory, first, that cities organized under the municipal corporations act are not subordinate to general law with reference to municipal affairs; and, second, that the general

municipal corporations act, which by its terms confers jurisdiction upon the city councils of the respective cities organized thereunder to hear and determine election contests, is the exclusive jurisdiction in that regard. With neither of these provisions do we agree.

Our supreme court in *Ex parte Helm*, 143 Cal. 556, [77 Pac. 453], has construed section 6 of article XI of the constitution of this state, as amended in 1896, to the effect that but two classes of municipal corporations are relieved from the control of general law in municipal affairs, these being those cities organized by special legislative charter prior to the adoption of the constitution of 1879, and cities operating under what is denominated a freeholders' charter; that other cities organized and operated under the municipal corporations act are subject and subordinate to general laws even in municipal affairs.

As to the jurisdiction of the common council to hear and determine election contests, we are of opinion that it is but a jurisdiction concurrent with the superior court conferred by the constitution and laws of the state. A long line of decisions tends to establish the proposition: That where jurisdiction is conferred upon a court or a body to exercise judicial functions, exclusive jurisdiction is not to be inferred, and is only to be so regarded where the language is so plain as to show the legislative intent in that regard. We see nothing in the municipal corporations act which confers upon common councils of cities of the sixth class organized thereunder authority to hear and determine election contests, as in any sense conferring exclusive jurisdiction.

Application for writ denied.

[Civ. No. 751. Third Appellate District.—June 13, 1910.]

**UNION LUMBER COMPANY, a Corporation, Respondent,
v. METROPOLIS CONSTRUCTION COMPANY, a Corporation, Appellant.**

APPEAL FROM JUDGMENT—DISMISSAL—FAILURE TO FILE TRANSCRIPT IN TIME—INSUFFICIENT EXCUSE—APPEAL FROM VENUE ORDER.—An appeal from the judgment must be dismissed for failure to file the transcript in the time limited by the rules of the court, if there is no unsettled statement or bill of exceptions that might be used directly on such appeal. It is an insufficient excuse to prevent such dismissal that an independent appeal is also pending from an order refusing to change the place of trial, and that there is an unsettled bill of exceptions thereon, and that appellant wishes to incorporate such appeal with the appeal from the judgment.

Id.—CONSTRUCTION OF RULE II—PENDENCY OF BILL OF EXCEPTIONS OR STATEMENT.—The bill of exceptions or statement of the case unsettled, allowing an excuse for delay in filing the transcript under rule II, is a bill or statement "which may be used in support of such appeal"—that is, the appeal from the judgment—and that rule does not refer to a bill of exceptions such as was prepared on a motion to change the place of trial.

Id.—SHOWING BY COUNTER-AFFIDAVIT—INSUFFICIENT GROUND FOR CHANGE OF VENUE—DEMAND AFTER RULING ON DEMURRER.—Where the counter-affidavit for respondent shows that the appellant failed to file his motion or demand or affidavit of merits for a change of the place of trial until after a demurrer filed to his complaint had been overruled, upon such showing he failed to comply with the statute, and his demand should be denied.

Id.—INSUFFICIENT SHOWING BY APPELLANT—PRESUMPTION OF INSUFFICIENT GROUNDS.—Where the grounds on which the change of the place of trial was moved for by the appellant do not appear, presumptively they were wholly insufficient and the motion properly denied, and it may be, as shown by respondent, that one of the grounds on which the court denied the motion was that the demand was not made in time.

MOTION to dismiss appeal from a judgment of the Superior Court of Yuba County. Eugene P. McDaniel, Judge.

The facts are stated in the opinion of the court.

James W. Cochran, for Appellant.

W. H. Carlin, for Respondent.

CHIPMAN, P. J.—Motion to dismiss the appeal from the judgment, “on the ground that no transcript on appeal in said action has ever been presented or filed in said appellate court and more than forty days have elapsed since the perfecting of such appeal.”

The action was commenced in the superior court of Yuba county. It appears from the certificate of the clerk of said court that the said court, on February 17, 1910, duly made and entered its judgment in said action in favor of plaintiff and against the defendant for the sum of \$1,796.66, which said judgment stands unsatisfied; thereafter, on March 7, 1910, said defendant served upon plaintiff and filed in the clerk's office the notice of appeal from said judgment to this court, and, on the same day, filed an undertaking on said appeal; that said superior court, on February 24, 1910, duly made and caused to be filed in the clerk's office of said court its findings and decision in said action, notice of which was on the same day duly served upon defendant; that no notice of intention to move for a new trial in said action has ever been filed in said office; that no stipulation or order granting any time for filing, preparing or serving any bill of exceptions, statement of the case or transcript in said action has ever been made, filed or entered therein, and no bill of exceptions or statement on said appeal has ever been filed in said action in the office of said clerk, or at all; that no motion for a new trial has ever been made, and no transcript on appeal has ever been certified by said clerk, or at all, nor has he been requested to certify to a correct or any transcript of the record on appeal, and no notice has ever been filed in said office by defendant and appellant in accordance with section 953a of the Code of Civil Procedure, or any notice in accordance with said section, or at all.

In a counter-affidavit, counsel for defendant does not controvert any of the facts above set forth, but deposes that after the commencement of said action, “to wit, at the time of the appearance of said defendant in said action,” defendant served on plaintiff its demand for a change of the place of trial, from Yuba county to the city and county of San Francisco, together with an affidavit of merits; that thereafter, to wit, on January 26, 1910, said motion was denied;

that within sixty days thereafter defendant perfected its appeal from said order and prepared and served upon plaintiff its purported bill of exceptions to said order denying said motion, and on May 12, 1910, said bill was allowed and filed. It is further deposed, apparently to excuse the failure to file the transcript on appeal from the judgment, that it was the intention of counsel, upon leave being obtained from the court, to incorporate in the record of appeal from the order the record also constituting the transcript on appeal from the judgment. Defendant prays that the time within which to print, serve and file transcript on appeal from the judgment be extended fifteen days from June 6, 1910, and that the record on both appeals be included in one transcript; or, if such leave be not granted, that the appeal from the judgment be dismissed without prejudice.

Counsel for plaintiff has filed an affidavit in reply to defendant's affidavit in which he denies that at the time of defendant's appearance defendant served upon plaintiff its demand for a change of the place of trial, and avers the fact to be that defendant did not serve and file its notice of said motion and affidavit of merits until after it had appeared in the action by demurrer and after said demurrer had been overruled.

Section 396, Code of Civil Procedure, requires the party desiring to move for a change of the place of trial to file an affidavit of merits, and demand in writing that the place of trial be had in the proper county, "at the time he answers or demurs." If his motion or demand is made after demurrer filed and overruled, he fails to comply with the statute and the demand should be denied.

Rule II provides that the appellant in a civil action shall within forty days after the appeal is perfected serve and file the printed transcript of the record. The rule sets forth certain facts which, if made to appear, will excuse non-compliance therewith. Here, however, appellant makes no showing that these facts exist, and respondent shows affirmatively, as provided in Rule VI, that they do not exist. The bill of exceptions and statement of the case referred to in rule II is a bill or statement "which may be used in support of such appeal," i. e., the appeal from the judgment, and does not refer to a bill of exceptions such as was prepared

on motion to change the place of trial. Appellant should have perfected its appeal from the judgment and filed its transcript in time, and not having done so the pending appeal from the order denying its motion for change of place of trial cannot avail it as an answer to the present motion.

Rule V provides that "if the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed upon motion, on notice given." The rule further provides that "if the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion." Subdivision 5 of rule II provides for extending the time within which points and authorities must be filed, but no such provision is made as to the filing of the transcript of the record on appeal. Assuming, however, that the court, as seems to be implied in the case of *McCabe v. Healey*, 139 Cal. 30, [72 Pac. 359], upon sufficient showing, will relieve a party from his default in filing his points and authorities in time, will also relieve him from like default, on sufficient showing, in failing to file his transcript in time (a point not necessary to decide), there is here no showing whatever excusing defendant's failure. The judgment was rendered in February, 1910, and in March defendant served its notice of appeal. There is no showing that a transcript of the record on appeal from the judgment, or any bill of exceptions, or statement in support of such appeal, is in course of preparation, and no excuse is offered for defendant's failure to prepare such transcript.

The grounds on which the change of place of trial was moved do not appear, and presumptively they were wholly insufficient and the motion properly denied. Furthermore, as we have seen, it appears from the affidavit, in behalf of plaintiff, that the demand for a change of the place of trial was not made until after the demurrer was filed and overruled, and it may be that this was one ground on which the trial court denied the motion.

The appeal from the judgment is dismissed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 752. Third Appellate District.—June 13, 1910.]

WILLIAM NUTLEY, Respondent, v. METROPOLIS CONSTRUCTION COMPANY, a Corporation, Appellant.

APPEAL FROM JUDGMENT—DISMISSAL—FAILURE TO FILE TRANSCRIPT IN TIME—INSUFFICIENT EXCUSE.—An appeal from the judgment must be dismissed for failure to file the transcript in time, where no such facts appear to excuse the delay as are stated in rule II of this court. The pendency of an appeal from an order refusing to change the place of trial is no sufficient excuse for failure to file the transcript on appeal from the judgment within the time limited therefor.

MOTION to dismiss an appeal from a judgment of the Superior Court of Yuba County. Eugene P. McDaniel, Judge.

The main facts are the same as those presented in case No. 751, *supra*.

James W. Cochran, for Appellant.

W. H. Carlin, for Respondent.

CHIPMAN, P. J.—Plaintiff moves to dismiss the appeal in the above-entitled action on the ground that no transcript of the record on appeal from the judgment in said action has been filed and more than forty days have elapsed since the perfection of such appeal.

With the exception as to the amount of the judgment recovered by plaintiff, the facts are the same as in *Union Lumber Co. v. Metropolis Construction Co.* (No. 751), *ante*, p. 584, [110 Pac. 329], in which a similar motion was this day decided.

Conformably with the decision in that case, the appeal is dismissed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 798. Second Appellate District.—June 14, 1910.]

PETER FAIR, Respondent, v. HOME GAS AND ELECTRIC COMPANY, a Corporation, Appellant.

ACTION FOR PENALTY FOR REFUSAL TO SUPPLY GAS—USE OF WORDS OF STATUTE—GAS FOR LIGHTING PURPOSES IMPLIED.—In an action to recover the statutory penalty for illegal and persistent refusal to supply plaintiff's residence with gas from its mains, after written demand therefor, where the statute does not specify gas for lighting purposes, which is implied in its use in a residence, it is sufficient that the language of the statute is followed in the complaint to recover the penalty for persistent refusal to comply with plaintiff's written demand for gas for the building occupied by plaintiff.

ID.—ACTION UPON STATUTE—CORRECT RULE OF PLEADING—CONSTRUCTION OF STATUTE AND PLEADING IDENTICAL.—Conceding that the language used in the body of the statute when it refers to "gas" is to be construed to mean "gas for lighting purposes," it is a correct rule of pleading, in declaring upon a statute, to describe the cause of action in the words of the statute. This is allowed even in criminal cases. The court cannot put one construction upon words used in a statute, and deny the same construction when the same words are used in a pleading. The statute and the complaint must have the same construction, and the word "gas," when used in either, must have the same meaning and application.

ID.—LOCATION OF HOUSE IN RELATION TO DEFENDANT'S MAINS—CONSTRUCTION OF COMPLAINT—AIDED BY ANSWER.—Where the complaint alleged that between certain dates plaintiff was the occupant of a building and premises which are and were through said period distant not more than one hundred feet from defendant's mains, and that from the first date until the present time plaintiff has resided upon said building and premises, is to be fairly construed as averring that the house and premises were at the date of filing the complaint located at the same distance from defendant's mains, in the absence of a special demurrer, and especially when the answer aided the complaint by expressly admitting that during all of the times mentioned in the complaint service pipes belonging to defendant, connected with said gas mains at plaintiff's said premises, have been and still are located on said premises.

ID.—SUFFICIENCY OF COMPLAINT TO SUPPORT JUDGMENT.—*Held*, that a general demurrer to the complaint was properly overruled, and that its allegations are a sufficient basis for the support of the judgment rendered upon the statutory penalty, which was correctly computed.

ID.—SUFFICIENT DEMAND ADMITTED.—Where the demand averred was sufficient plainly to inform defendant that it was required to per-

form the duty to which the demand referred, it was admitted by failure to deny it in the answer.

ID.—UNWARRANTABLE CLAIM IN ANSWER—DEPOSIT REQUIRED.—It affirmatively appears by the answer that the refusal to furnish gas was not based upon the insufficiency or uncertainty of the demand, but the reason therefor was plaintiff's refusal to comply with an arbitrary and unwarranted claim for ten dollars' deposit, which defendant sought to exact, and which it had no right to do.

APPEAL from a judgment of the Superior Court of San Bernardino County. Benjamin F. Bledsoe, Judge.

The facts are stated in the opinion of the court.

Halsey W. Allen, and Campbell & Moore, for Appellant.

E. C. Campbell, for Respondent.

ALLEN, P. J.—The complaint alleges the incorporation of defendant and that it is engaged in the business of supplying heating and illuminating gas to the inhabitants of the city of Redlands in San Bernardino county; that between June 26, 1908, and July 28, 1908, plaintiff was the occupant and inhabitant of a certain building and premises in the city of Redlands, which building and premises are and were throughout said period distant not more than one hundred feet from one of defendant's gas mains; that on the date first named defendant connected said building and premises with one of its mains, and until July 28th supplied gas to plaintiff for said building and premises; that upon said last-named date, without plaintiff's consent, defendant discontinued the supply of gas to said building, shutting off the same therefrom, without making any demand whatever on plaintiff for the payment of any sum on account of gas theretofore used; that on July 29, August 14 and August 24, 1908, plaintiff made demand in writing of defendant that it supply him with gas for said building and premises; that from July 28th until the filing of the complaint no gas was supplied to said building or premises; that on July 28th and 29th at the time plaintiff's written demand upon defendant to supply him with gas was made, plaintiff was not in arrears for the payment of gas supplied; that defendant's sole purpose in removing the meter and shutting off the supply of gas was to annoy and injure plaintiff; that de-

defendant demanded of plaintiff a cash deposit or bond of indemnity against loss as a condition of again installing the meter in said premises and supplying gas; that this was an arbitrary discrimination against plaintiff; that no other consumers were required to make a deposit of ten dollars, and that such exaction was to spite, harass and annoy plaintiff. That from July 28th until the time of the filing of the complaint herein plaintiff resided in said building and premises, and during that time has been without any heating or illuminating gas; that on October 28, 1908, plaintiff demanded of defendant the payment of fifty dollars and five dollars per day from August 9, 1908, said sums being damages fixed by law for defendant's failure to supply him with gas; and he asked judgment accordingly.

Defendant denies all the allegations of the complaint other than as to the demand of plaintiff to supply him with gas as averred.

Upon the hearing the court found all the allegations of the complaint to be true, except as to certain allegations which have no significance upon this appeal. The court also found, in conformity with the answer, that another corporation had at all the times mentioned gas mains within one hundred feet of said premises and dwelling-house of plaintiff; found that at all times service pipes belonging to defendant were connected with defendant's gas mains for supplying plaintiff with gas, and are still located upon said premises.

Judgment was rendered in favor of plaintiff for \$625, with interest at seven per cent per annum from the date of such judgment. This appeal is from the judgment alone.

Appellant's primary contention is that the complaint is insufficient, in that there is no allegation that the application to defendant was for gas for lighting purposes, and no averment that plaintiff ever made application in writing to defendant to furnish him with gas for lighting purposes, nor any averment that defendant ever refused or neglected to supply gas for lighting purposes. This action is one based upon a statute, the enacting clause of which is as follows: "An act to repeal Title XV of Part IV of Division First of the Civil Code, and to substitute therefor in said code a new Title XV, relating to corporations formed for the purpose of furnishing light for public use." (Stats. 1905, p. 592.) The statute provides, section 629: "Upon

the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main, or direct or primary wire, of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas or electricity as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas or electricity required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars per day as liquidated damages for every day such refusal or neglect continues thereafter." Conceding for the purposes of this decision that the language in the body of the statute, when it refers to gas, means gas for lighting purposes, nevertheless, the complaint in the action is in the language of the statute. A similar question was presented to the supreme court of Illinois in the case of *Gebhart v. Adams*, 23 Ill. (345) 397, [76 Am. Dec. 702], wherein it is held that: "It is a correct rule, in declaring upon a statute, to describe the cause of action, whatever it may be, in the words of the statute. Even in criminal cases this is allowed. . . . The court cannot put one construction upon words in a statute, and deny them the same construction when the same words are used in a declaration or plea. The pleader is not bound, in declaring upon a statute, to set forth all or any of the words the court may have used in construing the statute, for when they have placed their construction upon it, and say that it means a particular thing, the words of the statute must be construed to mean the same thing in a declaration on that statute. This is a self-evident proposition." Accepting this rule, and the reasoning upon which it is based is most convincing, the statute under consideration and the complaint based thereon must receive the same construction, and the word "gas," when used in either, shall be held to have a like meaning and a like application. It follows, then, that the averments in the complaint found by the court to be true must be held sufficient under the statute.

We do not think the criticism directed to the allegations of the complaint, because of the alleged omission to aver definitely the location of the house and premises at the time when

the demand for gas was made and thereafter, is so serious as to warrant a reversal of the judgment. It is alleged that from June 26 to July 28, 1908, plaintiff was the occupant and inhabitant of the building and premises known as 536 Chestnut avenue, "which said building and premises *are* and were throughout said period distant not more than one hundred feet from one of defendant's mains." It is further averred "that from June 26, 1908, until the present time plaintiff has resided in said building and premises." The answer admits that at all times mentioned in the complaint service pipes belonging to defendant connected with said gas mains at plaintiff's said premises and residence have been and still are located on said premises. We think a fair construction of the complaint is to say that it avers that the house and premises were at the date of the filing thereof within the required distance and were so situated during the limited period mentioned. Aside from any distinction which may be said to exist between the effect to be given subdivision 32 of section 1963, Code of Civil Procedure, in relation to presumptions arising from certain things proven and the presumptions which will follow the allegations of the pleading, the imperfection, if any, in plaintiff's allegation as to the status in the interim is aided by the answer, which, fairly construed, tends to allege a continuance of the status during all the times mentioned in the complaint. The demurrer was general; no uncertainty was claimed as to such complaint, and a consideration of its allegations after judgment leads us to regard it as a sufficient basis for the judgment.

As to the demand, there is no denial thereof in the answer, and the defendant was plainly informed that it was required to perform a duty to which the demand referred. In addition to this, it affirmatively appears by the answer that the refusal to furnish gas was not based upon the insufficiency or uncertainty of the demand, but the reason therefor was plaintiff's refusal to pay an arbitrary and unwarranted claim for ten dollars' deposit, which defendant sought to exact and which it had no right to do. By its answer defendant admitted that conditions were such that it was willing, upon payment of the deposit, to furnish plaintiff with the gas required.

We are of opinion that the complaint alleged and the court found sufficient to entitle plaintiff to recover under the statute,

and that the amount of the judgment under the statute was correctly computed.

Judgment affirmed.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 807. Second Appellate District.—June 14, 1910.]

R. A. ATWOOD et al., Respondents, v. LITTLE BONANZA QUICKSILVER COMPANY, Appellants.

ATTACHMENT—NEGOTIABLE NOTE MADE OUT OF STATE—FOREIGN CORPORATION—PLACE OF PAYMENT—CODE PROVISION—PRESUMPTION.— Although section 3100 of the Civil Code provides that “a negotiable instrument which does not specify a place of payment is payable at the residence or place of business of the maker, or wherever he may be found,” yet, where the maker is a foreign corporation having its principal place of business in Boston, Massachusetts, where all of its directors reside, and where its note was executed and dated, without designating a place of payment, it was presumptively payable there, in relation to the attachment laws of this state, and though such corporation is doing business in this state, in compliance with its laws, an attachment against it on such note will not lie in this state.

ID.—PROVISIONS OF ATTACHMENT LAW—CONTRACT MADE OUT OF STATE—EXPRESS PAYMENT IN STATE ESSENTIAL.—To authorize an attachment in this state upon a contract not made in the state, it must appear that the money must have been made payable in this state by the contract itself. The right of attachment, in such case, depends upon the contract being for the direct payment of money, and it is essential to such right that the agreement itself should contain some provision indicating that such money was payable in this state.

ID.—TERMS OF NOTE CONCLUSIVE—ORAL EVIDENCE INADMISSIBLE.— Where by its terms a note made out of this state is legally presumed to be payable out of the state, the parties are concluded by the legal terms of their contract, whenever the attachment laws of this state are invoked, and oral evidence to vary the legal terms of the contract is inadmissible.

ID.—REFUSAL TO DISSOLVE ATTACHMENT—IMPLIED FINDING—ABSENCE OF CONFLICT—REVERSAL.— Where an order denying a motion to dissolve an attachment upon a note made out of this state rests upon an implied finding that it was payable in this state, based upon illegal oral evidence as to the place of payment, contrary to the legal terms of the note, no question of conflict arises upon such evidence, and the order must be reversed.

APPEAL from an order of the Superior Court of San Luis Obispo County refusing to dissolve an attachment. **E. P. Unangst, Judge.**

The facts are stated in the opinion of the court.

Wm. Shipsey, for Appellants.

Lamy & Putnam, for Respondents.

ALLEN, P. J.—The action was upon certain negotiable instruments on their face executed by the corporation at Boston, Massachusetts, without definite place of payment therein stated. At the commencement of the action, plaintiffs, by an affidavit filed, alleged that the notes were payable within this state, and other facts requisite in order to procure a writ of attachment. No statements, however, were therein contained as to the residence of defendant corporation. The writ was issued and a motion made to dissolve the same, upon the ground that the instruments were made in another state and were not payable in this state. Upon the hearing of such motion, affidavits were presented by the defendants to the effect that defendant corporation was a foreign corporation, with its principal place of business in Massachusetts; that the members of the board of directors were all residents of said state; that the notes were there executed, copies of which notes were set out in the affidavits. Plaintiffs by certain affidavits filed sought to show that, notwithstanding the omission to specify the place of payment, it was understood and agreed when said notes were delivered that the same were payable either in Massachusetts or California; that payment thereof was to be made from the proceeds of certain mines being operated by defendant corporation in San Luis Obispo county, this state; that after the execution of the notes defendant corporation filed copies of its articles of association in this state and appointed a person upon whom process might be served, all in conformity with the laws of this state; that other actions had been commenced after the execution of these notes and judgment had thereon against defendant corporation in this state. The court below denied the motion to dissolve, from which order defendants appeal.

It is insisted by respondents that the order of the court denying the motion rests upon an implied finding that the notes were payable in this state, and there being a conflict in the evidence in that regard, an appellate court will not disturb the same. This would be the true rule were a conflict in the evidence apparent. As the record is presented, however, the question of conflict only arises upon the theory that the evidence offered of a contemporaneous oral agreement was proper for consideration and admissible. It is true that section 3100, Civil Code, provides: "A negotiable instrument which does not specify a place of payment is payable at the residence or place of business of the maker, or wherever he may be found." Were it an open question we should be inclined to the opinion that such section was intended to modify a rule declared in many jurisdictions, to the effect that, "where no place of payment is expressed in a note, the place of payment is understood to be where the maker resides," while in other jurisdictions the rule was, "as between the original parties, however, all debts are payable everywhere, unless some special provision to the contrary is made, and the rule is that debts have no situs but accompany the creditor everywhere." (Story on Bills, sec. 159; *Slacum v. Pomery*, 6 Cranch, 221.) But we are confronted with the construction of such section as applied to attachment proceedings in *Tuller v. Arnold*, 93 Cal. 168, [28 Pac. 864], where it is said: "The contract, having been made in Illinois, was presumptively to be performed there, and an attachment could not be taken out here, even although it is true in a general sense that the money was payable wherever the defendants could be found. To authorize the issuance of an attachment, the money must have been made payable in this state by the contract itself." (Citing authorities.) The right to an attachment in any event depends upon the contract being for the direct payment of money, "and it is essential to such right that the agreement itself contain some provision indicating that such money was payable in this state." (*Drake v. De Witt*, 1 Cal. App. 618, [82 Pac. 982]; citing in support, *Dulton v. Shelton*, 3 Cal. 208; *Eck v. Hoffman*, 55 Cal. 502.) Accepting this as the rule, and the terms of the note being admitted, it follows that no evidence was competent which undertook to change or modify the language of the instrument. Whatever may have

been the understanding of the parties as to the place of payment, they are concluded by the terms of their written contract and the legal presumptions attaching thereto, whenever they invoke the attachment laws of this state. No conflict arising, therefore, from competent evidence, we are constrained to hold that, as a question of law, the writ of attachment should have been dissolved, and that the court erred in denying such motion.

Order reversed and cause remanded for further proceedings.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 779. Second Appellate District.—June 15, 1910.]

BARBER ASPHALT PAVING COMPANY, a Corporation,
Respondent, v. **THE SANTA BARBARA ICE COM-**
PANY, a Corporation, Appellant.

SALE OF ASPHALT IN BOXES—PLEADING—COUNTS—EXPRESS PROMISE—
REASONABLE VALUE—DEBT—CONSISTENT FINDINGS—SURPLUSAGE.—

In an action for the sale of one hundred and eighty-eight boxes of asphalt mixture by plaintiff to defendant, where the first count of the complaint was upon an express promise to pay therefor \$2.25 per box, amounting to \$423, and the second count was for the reasonable value of the material and labor done in their preparation at the same price and amount, and the third count was in debt for the same amount, findings in favor of plaintiff upon all three counts were not in conflict so as to warrant a reversal; but the finding upon the first count is sufficient to support the judgment, and the other findings, not being in conflict therewith, may be treated as surplusage.

ID.—PROMISE TO PAY FIXED SUM—LIABILITY NOT AVOIDED BY MODE OF
FIXING VALUE.—If one promises to pay a fixed sum for articles furnished him by another, he cannot avoid liability, in the absence of fraud or misrepresentation, because it may appear that the articles were not worth, in a crude state, the sum agreed to be paid, but were only of such value with the labor of putting them in position.

ID.—SUPPORT OF FINDINGS.—Where there was some evidence which warrant the court in finding that the goods were furnished at the request of the defendant, under a promise to pay therefor a fixed sum, this court cannot disturb such findings.

APPEAL from a judgment of the Superior Court of Santa Barbara County. S. E. Crow, Judge.

The facts are stated in the opinion of the court.

Day & Day, for Appellant.

W. P. Butcher, and C. A. Storke, for Respondent.

ALLEN, P. J.—The record presented upon this appeal is somewhat confusing. It appears therefrom that on February 17, 1909, the plaintiff filed its complaint containing two counts, the first thereof alleging that between certain dates named plaintiff furnished one hundred and eighty-eight boxes of asphalt mixture and laid the same on the streets of Santa Barbara at defendant's instance and request; that defendant promised to pay plaintiff therefor the sum of \$2.25 per box, amounting to \$423 in all. In the second count it is alleged that between the same dates such material was furnished and that the same, and the labor of laying the same on the streets, was reasonably worth \$2.25 per box, amounting to \$423 in all.

To this complaint a demurrer was interposed. It seems that on March 15th the demurrer was sustained by the court, and in the same order defendant was given ten days to answer. A minute entry, however, appears in the record to the effect that upon the same date of the rendering of the decision upon the demurrer, plaintiff was permitted to amend its complaint by inserting the words, "to the defendant," in an appropriate place, so that the complaint read that between the dates named the plaintiff furnished to the defendant the articles; and the same correction appears in the second count.

We think it may be said it appears from the record that this amendment was permitted and made after the order was made sustaining the demurrer, and that thereafter the complaint as amended was before the court. No demurrer was interposed to the complaint as amended, and an answer was duly filed, which was a denial that the goods and merchandise were furnished to defendant, and denies a promise to pay therefor. Thereafter, an attempt was made to file another amendment to the complaint, the sufficiency of which as a count in debt is open to question. The cause proceeded to

trial, however, upon the issues as presented, and the court found that plaintiff did furnish and lay on the streets at defendant's instance and request the goods and merchandise, and defendant promised to pay for the same the sum of \$2.25 a box; further, that between the dates named plaintiff furnished, at defendant's instance and request, the articles, and that the articles furnished and the labor of laying the same were reasonably worth \$2.25 a box; further, that the matters set out in the third cause of action were true.

Judgment was rendered in favor of plaintiff for the sum of \$423 and costs. Motion for new trial was filed, which was denied, and from the judgment and order denying a new trial defendant appeals.

We think the first and second counts as amended each state a cause of action. It is obvious that these counts each relate to the same matter and are an attempt to declare upon a liability growing out of the same transaction for the identical goods sold. The findings are to the effect that the goods and merchandise were laid on the streets at the request of defendant, and that defendant promised to pay the sum of \$423 therefor, and also that the articles furnished and the work and labor thereof were reasonably worth \$423. We do not regard the finding of a promise to pay and the finding of the reasonable value of the goods to be so inconsistent as to warrant a reversal. Neither would the finding on the attempted count in debt justify a reversal, assuming it to be not in proper form. The finding of a promise to pay is sufficient to support the judgment, regardless of the finding as to the value, and the finding that the materials and the labor of laying the same were reasonably worth the amount which the defendant originally promised to pay for the materials alone is not in conflict with the first finding; neither is the third finding in conflict with the first or second. There being one finding sufficient to support the judgment, the others, not being in conflict, may be treated as surplusage. If one promises and agrees to pay a fixed sum for articles furnished him by another, he cannot avoid liability, in the absence of fraud or misrepresentation, because it may appear that the articles were not worth in a crude state the sum agreed to be paid, but were only of such value with the labor of placing them in position. In addition to this, there is no denial of the value of the materials fur-

nished. The only issues presented were as to the actual furnishing and the promise to pay, as to both of which matters the court found against appellant.

Appellant insists further that the evidence is not sufficient to support the findings. An examination of the record, however, discloses that there was some evidence which warranted the court in finding that the goods were furnished at the request of defendant under a promise to pay therefor a fixed sum, and we cannot, therefore, interfere with the findings of the court in that regard.

We see no prejudicial error in the record, and the judgment and order are affirmed.

Shaw, J., and Taggart, J., concurred.

[Civ. No. 810. Second Appellate District.—June 15, 1910.]

A. F. SCHIFFMAN, Respondent, v. PEERLESS MOTOR CAR COMPANY, a Corporation, Appellant.

EXCLUSIVE AGENCY FOR SALE OF MOTOR CARS—BREACH OF CONTRACT BY PRINCIPAL—SUPPORT OF FINDINGS.—In an action by one to whom an exclusive agency was contracted for to sell defendant's motor cars within a specified territory, to recover from the principal damages for the breach of such contract, it is held that findings that plaintiff complied with the contract on his part and was at all times ready, able and willing to perform it in all respects, but that defendant violated the contract, to plaintiff's great damage, by soliciting orders within the territory allotted to such exclusive agency, in violation and breach of its contract with plaintiff, are fully supported by the evidence.

ID.—MEASURE OF DAMAGES FOR BREACH OF CONTRACT.—The measure of damages for such a breach of the obligation of the contract is found in the general rule presented in section 3300 of the Civil Code, as being that amount which will compensate the plaintiff for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

ID.—DEPRIVATION OF PROFITS NOT SPECULATIVE OR UNCERTAIN.—The profits which plaintiff was deprived of by the breach of the contract for an exclusive agency in specified territory are those which he would have made from the sale of machines wrongfully sold by defendant therein, had the defendant refused to invade the exclusive

territory granted to him, or have referred inquiries of purchasers to him as it agreed to do in the contract. There is nothing speculative or uncertain as to the amount of the profits of which plaintiff was thus deprived, but their loss is so closely connected with the breach of the obligation that the injury is not remote in its nature or origin.

ID.—PROFITS AND ADVANTAGES EXPRESSLY AGREED.—When profits and advantages are expressly stipulated for in the contract, and are the real purpose and direct and immediate fruit of a contract, they are part and parcel of it and must be considered as entering into and constituting a portion of its very elements, and they cannot be said to be collateral or remote.

ID.—ESTOPPEL OF DEFENDANT.—The defendant violating its express contract is estopped to deny that plaintiff would have made sale of the machines sold by defendant but for its violation of the contract.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

Arthur L. Hawes, A. D. Laughlin, Percy R. Wilson, and E. W. Freeman, for Appellant.

Lynn Helm, and Shankland & Chandler, for Respondent.

TAGGART, J.—Action to recover damages for breach of contract. Judgment for plaintiff and defendant appeals therefrom and from an order denying its motion for a new trial.

Plaintiff and defendant entered into an agreement on January 28, 1905, which recites that defendant is engaged in the manufacture of motor cars and parts which it desires to market to the best advantage, and that plaintiff proposes to engage in the sale of defendant's product and agrees to purchase a certain number of its motor cars, to be resold within a certain fixed territory named (seven counties of Southern California). Plaintiff agreed not to sell or solicit orders for any cars outside of the territory named at any time prior to November 1, 1905, and defendant agreed not to solicit any orders or sell any cars within said territory, within that time, but to refer all inquiries from persons residing within that territory to the plaintiff. The plaintiff was to maintain proper quarters

in a suitable location in Los Angeles for the storage of stock and the repair of cars and carry a reasonable quantity of supplies and spare parts for the repair and maintenance of motor cars manufactured by defendant, and the latter was to supply printed matter advertising its cars, mentioning the name of plaintiff as engaged in the sale of such cars within the territory named. Provisions were also made for local advertising by plaintiff and the expense of exhibiting at local fairs, etc. Plaintiff was to purchase three motor cars at a fixed price and model for delivery in February, 1905, being allowed twenty per cent discount from the list price, which was f. o. b. Cleveland, Ohio; and it was agreed that defendant should sell to plaintiff motor cars, parts and supplies, manufactured or handled by it, on the same terms during the existence of the contract. Deliveries to be deemed complete on board cars at Cleveland.

The court finds that the plaintiff supplied and maintained the quarters required, and did not refuse, neglect or fail to prosecute the sale of defendant's motor cars, but complied in all respects with the terms of the contract, and was at all times during its existence ready, able and willing to perform it in all respects; but that defendant solicited orders and made sales of cars and parts thereof within the territory described during the term for which such contract was to continue; and that the plaintiff has suffered damages by reason of the particular breaches of contract, specifically found, in the sum of \$4,145, less a setoff of \$150, for which balance judgment is given.

Appellant, in its attack upon the judgment, relies principally upon the contention that, under the contract, the plaintiff was merely a purchaser of the three cars which the defendant required that he buy as an earnest of his intentions to assume the sale of its cars in the territory described. That such was not the intention or understanding of the parties is clearly disclosed, not only by the instrument itself, but the contemporaneous and subsequent construction placed upon it by them in their correspondence. The "agency of Schiffman" is frequently mentioned and assumed, and in one letter, under date of February 22, 1905, signed by defendant per its "Sales Manager," appears the following: "We are pleased to have the agency in the name of Mr. Schiffman."

Equally without support is the contention that the contract of employment by plaintiff of Messrs. J. M. Pawley and H. L. Olive constituted them partners in the agency. In the letter above quoted from these men are mentioned as being in the employ of plaintiff, and in letters under date of February 7th and March 8th, written by plaintiff to defendant, the relation between the parties is made plain.

The evidence abundantly justifies the finding that defendant violated its agreement not to sell Peerless machines within the territory allotted to plaintiff, and also the finding that machines were sold to seven different persons, and that some \$500 worth of parts of machines were also sold therein by other parties for defendant during the existence of the contract. The arrangement by which these sales were made through another agency in Toledo, Ohio, was clearly brought home to the defendant. It is also shown by the evidence that during the time these machines were being so sold the plaintiff, in compliance with the contract, continued to maintain an agency in the city of Los Angeles in the name of the defendant, paying the expenses thereof out of his own pocket, and that defendant represented to him that it was unable to supply machines to meet the orders sent to it by the plaintiff. There can be no question that this was a violation of the contract.

The measure of damages for such a breach of obligation is found in the general rule declared in section 3300 of the Civil Code, to wit, that amount which will compensate the plaintiff for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. In applying this section it is, of course, subject to the limitation that no damages can be recovered which are not clearly ascertainable in both their nature and origin (sec. 3301). The profits which plaintiff here complains that he was deprived of are those which he would have made from the sale of these machines had the defendant either refused to invade the exclusive territory granted to him or have referred the inquiries of the purchasers to him, as it agreed to do in the contract. There is nothing speculative or uncertain as to the amount of profits of which plaintiff was thus deprived, and their loss is so closely connected with the breach of the obligation by defendant, that it is difficult to see any ground upon which it can be said that plaintiff's injury is too remote either

in nature or origin. We are of opinion that these profits are such as plaintiff is entitled to recover under the authorities in this state. (*Sanford v. East Riverside*, 101 Cal. 275, [35 Pac. 865]; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, [41 Pac. 1020].) When profits and advantages are expressly stipulated for in the contract, and are the real purpose and direct and immediate fruit of a contract, they are part and parcel of it and must be considered as entering into and constituting a portion of its very elements. (*Shoemaker v. Acker*, 116 Cal. 245, [48 Pac. 62].) In such a case it cannot be said that the profits are collateral or remote. Another element entering into the consideration of such a question is that of the estoppel of defendant to deny that plaintiff would have made sale of these machines but for its violation of the contract. It does not lie in its mouth to say, you could not have sold these machines had I not devised a method whereby your employees could make these sales through another agency.

We are not informed by counsel for either party upon what theory the balance of \$3,995, for which judgment was given, was reached, and the record contains nothing from which this court can determine the prices paid for the cars sold by defendant, or determine the amount of freight which plaintiff would have paid on these cars had they been delivered to him f. o. b. at Cleveland, and he required to pay the freight. We cannot assume the trial court did not charge the freight to plaintiff, nor could the judgment be modified upon this theory, if appellant's contention in this regard is correct.

The numerous errors of law specified are not presented any further than they incidentally arise in discussing the foregoing propositions; therefore, they are not separately considered.

Judgment and order affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 822. Second Appellate District.—June 16, 1910.]

**OAK HILL WATER COMPANY, a Corporation, Appellant,
v. T. W. GILLETTE, W. A. GILLETTE, and D. S.
GATES, Respondents.**

ACTION TO QUIET TITLE—PRIVATE LOTS PROJECTING INTO STREET—STREET IMPROVEMENT—CROSS-COMPLAINT TO FORECLOSE LIEN—FINDING—ERROR IN ASSESSMENT.—In an action against street contractors to quiet title to private lots projecting ten feet into a street, and where defendants sought by cross-complaint to foreclose a street assessment thereon, in which the court found that the city had no right to such strip as part of the street, where it cannot be said the resolution of intention to improve the street passing said lot intended to exercise jurisdiction over private property, it follows that the contractors had no authority to construct a sidewalk across such strip, and that the superintendent of streets should not have accepted the work as completed, since the sidewalk was not constructed on and in front of said lots, and that he erred in so doing, and also in including the cost of constructing the sidewalk crossing the same in the assessment.

ID.—ERROR IN ASSESSMENT NOT AVOIDING LIEN.—None of the acts of the contractors or of the superintendent of streets, nor any errors on his part in accepting the work as complete, and including improper cost of work in the assessment, can render the assessment and lien thereof void.

ID.—REMEDY BY APPEAL TO CITY COUNCIL.—Under section 11 of the street improvement act, the determination and acts of the street superintendent in relation to such errors is made the subject of an appeal to the city council by the owners or parties interested, upon the hearing of which the city council may confirm, amend, set aside, alter or correct the assessment in such manner as shall seem just, and may instruct the street superintendent to correct the warrant, assessment and diagram to conform to its decision.

ID.—FAILURE OF PLAINTIFF TO APPEAL TO COUNCIL—PRESUMPTION—ORDER FORECLOSING LIEN AFFIRMED.—Where the plaintiff, in the action to quiet title against the contractors, failed to appeal from the determination of the superintendent of streets, as to the completion of the work and from the erroneous levy of the assessment, it must be presumed that if he had done so the city council would have ordered the errors corrected; and the order of the court foreclosing the lien asserted by the contractors in their cross-complaint must be affirmed.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

McNutt & Hannon, for Appellant.

Gibson, Trask, Dunn & Crutcher, for Respondents.

SHAW, J.—Action to quiet title to two certain lots fronting on Glenarm street in the city of Pasadena, described as lots 24 and 25, Mills tract.

Defendants admit plaintiff's title to the property, but claim and assert a lien thereon by virtue of an assessment for the cost of certain street improvement work done under the street improvement act, which lien they ask, by cross-complaint, to have foreclosed. The court made its findings upon which a decree of foreclosure was rendered in accordance with the prayer of defendant's cross-complaint. Plaintiff appeals from the order denying its motion for a new trial.

The city council of Pasadena by resolution in due form declared its intention to improve Glenarm street from the east line of Fair Oaks avenue to the original east boundary line of the city, the width of which street is not disclosed by the record. It is admitted that on the face thereof all the proceedings were duly had and taken. Nevertheless, appellant claims that the resolution of intention and all the proceedings had thereunder were wholly void, for the reason that in said resolution of intention and proceedings had thereunder the city council included therein the private property of plaintiff. This claim is based upon the fact that said lots 24 and 25, which front upon the north side of the street, extended across the north line thereof as the same was located on either side of said lots, and that they projected into the street a distance of ten feet, and the sidewalk, the construction of which was included among other improvements ordered, was by the contractors constructed over this ten-foot strip so projecting into the street.

Appellant lays much stress upon a finding made by the court to the effect that the city of Pasadena unlawfully and without right claimed said ten-foot strip as part of the street, and it contends that by reason of such claim on the part of the city it necessarily follows that it was the intention of the city council to improve the strip by constructing the sidewalk thereon. "The whole fault," says appellant, "lies in the fact that in the *resolution of intention* and the *ordinance ordering*

the work to be done, the private property was claimed to be a part of the street and was proposed to be improved as such." It is undoubtedly true that the intention of the city in this regard must be determined from the resolution of intention and proceedings had thereunder. Neither the resolution of intention nor other proceedings, however, so far as disclosed by the record, make any reference to property other than that embraced within the side lines of the street between the points named, which is conceded to have been an open public street. Regardless of what its undisclosed claim may have been as to lands other than those actually embraced in the street, it cannot be said that by *such proceedings* the city council proposed or attempted to exercise jurisdiction over such land, to which it had no right and which in fact was no part of the street. There is absolutely nothing in the resolution of intention or other proceedings which tends in the slightest degree to show that the city authorized, or that it was its intention to authorize, the improvement of the private property of plaintiff, or the laying of the sidewalk other than along the side of the street. Hence, there is no analogy between this case and *Spaulding v. Wesson*, 115 Cal. 441, [47 Pac. 249], cited by appellant. It was there held that what was designated in the proceedings as "Union street," between Larkin and Franklin streets, in San Francisco, was not a public street, but that it was held in private ownership and had not been dedicated to public use. The proceedings there taken contemplated the improvement, not of a public street, but of a piece of land held in private ownership, known as "Union street." Clearly, no warrant existed in the street improvement act for the doing of the work thus described in the resolution of intention.

In the case at bar, as the council did not order other than the area embraced in Glenarm street to be improved, it follows that the contractors had no authority by virtue of said proceedings to construct a sidewalk upon the ten-foot strip which was no part of the street. The superintendent of streets should not have accepted the work as completed, for the reason that the sidewalk was constructed on and not in front of these lots. Neither should the cost thereof have been included in the assessment made to cover the total cost of the improvement. Conceding, however, that the contractors constructed the sidewalk upon this strip under the direction of the superintendent of streets, nevertheless, inasmuch as it was not in-

cluded in the resolution of intention and the council did not order it, there was no authority for doing it; and, hence, the officer erred, both in directing it to be done and in accepting the work thus incomplete, as well as including the cost thereof in the assessment. None of these acts, however, rendered the assessment and lien thereof void. By the provisions of section 11 of the street improvement act (Henning's Cal. Gen. Laws, p. 1322), the determination and acts of the street superintendent in relation to all of these matters is made the subject of an appeal to the city council by the owners or any person interested. Upon the hearing of such appeal the city council is given the power to "confirm, amend, set aside, alter, modify or correct the assessment in such manner as to them shall seem just, and require the work to be completed according to the directions of the city council; and may instruct and direct the superintendent of streets to correct the warrant, assessment, or diagram in any particular, or to make and issue a new warrant, assessment, and diagram, to conform to the decisions of said city council in relation thereto, at their option"; "and revise and correct any of the acts or determinations of the superintendent of streets relative to said work." Plaintiff did not exercise its right to appeal. Had it done so, and the attention of the council been directed to the fact that not only was the work incomplete by reason of the failure of the contractors to construct the sidewalk in front of the lots instead of on and across the ends thereof so projecting into the street, but also to the fact that the cost of the sidewalk so constructed had been included in the assessment for the total cost of the work, no doubt the council would have met the objections by an exercise of the power vested in it by section 11 and caused the errors to be corrected. At all events, we must indulge in that presumption. (*Lambert v. Bates*, 137 Cal. 676, [70 Pac. 777]; *Warren v. Riddell*, 106 Cal. 352, [39 Pac. 781]; *Diggins v. Hartshorne*, 108 Cal. 154, [41 Pac. 283].)

The order appealed from is affirmed.

Allen, P. J., and Taggart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 11, 1910.

[Civ. No. 814. Second Appellate District.—June 17, 1910.]

J. E. FINNALL, Appellant, v. J. W. B. MERRIMAN, Respondent.

MOTION FOR NEW TRIAL—STATEMENT OF CASE—AUTHENTICATION BY JUDGE ESSENTIAL.—Where a party moving for a new trial gives notice that it will be upon a statement of the case, it is his duty to propose such a statement, and have it settled, signed and certified by the judge; and it must be so authenticated before it can be filed with the clerk. Without such signature and certificate of the judge there is no statutory statement on which the motion may be heard; and an unauthenticated paper printed in the transcript is no part of the record upon appeal and must be disregarded.

ID.—EFFECT OF STIPULATION IN TRANSCRIPT AS TO RECORD—EVIDENCE NOT MADE REVIEWABLE.—A stipulation in the transcript that it contains a correct copy of the record, including the instructions given and refused by the court, as well as the statement on motion for a new trial, cannot have the effect to present such statement to the court as a basis for a review of the evidence therein contained.

ID.—ERROR IN INSTRUCTIONS NOT SHOWN.—Conceding, for the purposes of the case, that the stipulation presents the instructions given and refused, yet this court cannot say, in the absence of any evidence in the record presented upon the trial that can be considered, that the giving or refusal of such instructions constituted reversible error, especially where there is nothing in the record indicating that the giving or refusal of such instructions was properly excepted to at the time.

ID.—INTENDMENTS IN FAVOR OF SUSTAINING INSTRUCTIONS.—All intendments are in favor of sustaining the instructions of the court, and if such instructions are proper upon any possible view of the evidence, the action of the court thereon must be sustained.

APPEAL from an order of the Superior Court of Riverside County denying a new trial. F. E. Densmore, Judge.

The facts are stated in the opinion of the court.

W. L. Williams, and Hammack & Hammack, for Appellant.

Purington & Adair, for Respondent.

ALLEN, P. J.—The action was brought upon a promissory note executed by the defendant to plaintiff's assignor. The answer set up facts showing there was no consideration there-

for; that the note was executed to one Rogers, plaintiff's assignor, who was agent for a life insurance company, under an agreement that if defendant's application for a policy of insurance was declined the note was to be returned; that defendant's application was rejected and no policy ever issued; that Rogers represented to defendant that he would make application to another company for a like policy and that if upon receipt of said policy the defendant, after an examination of the same, was dissatisfied therewith, the privilege would be given him to return such policy without any liability for the payment of the premium, or of the note theretofore executed; that a second company did issue a policy; that defendant within the stipulated time examined the same, was dissatisfied therewith and returned the policy to the company; that Rogers, in violation of his agreement, transferred the note to plaintiff. It was alleged that plaintiff did not purchase or acquire the note in the ordinary course of business; that he had knowledge at the time of said purchase of facts and circumstances concerning the making of the note, and that the price paid therefor by plaintiff was grossly inadequate to the amount expressed on the face of the note, sufficient to arouse the suspicions of an ordinarily prudent man and put him on inquiry as to the consideration of said note; denied that plaintiff was the *bona fide* holder of the note for value.

The case was tried by a jury, which returned a verdict for defendant. Judgment was rendered upon such verdict June 24, 1908. Thereafter, on July 14, 1908, plaintiff moved for a new trial, specifying in said motion that the same would be made upon a statement of the case. When this motion for a new trial was denied, if, in fact, it was denied, is not made to appear. The appeal is from the order denying a new trial.

The transcript contains no statement settled or signed by the judge. Rule III of the court is violated by the omission to give the name of the judge whose decision it is sought to review. "When notice is given of a motion for a new trial, to be made on a statement of the case, it is the duty of the moving party to propose such a statement, and have it settled, signed, and certified by the judge. The statement must be authenticated in that way before it can be filed with the clerk of the court. . . . But the signature and certificate of the judge are indispensable. Without them there is no statutory

statement on which the motion may be heard. An unauthenticated paper in the transcript, purporting to be a statement, is no part of the record on appeal, and must be disregarded.” (*Adams v. Dohrmann*, 63 Cal. 418.) There is in the transcript a stipulation that the same contains a correct copy of the record, including the instructions given and refused by the court, as well as the statement on motion for a new trial, but this cannot have the effect to properly present such statement to the court as a basis for a review of the evidence therein contained. Conceding, for the purposes of this case, that this stipulation presents the instructions given and refused, we cannot say, in the absence of any evidence presented upon the trial, that the giving or refusal of such instructions constituted reversible error. Nor is there anything before us indicating that the giving or refusing of such instructions was properly excepted to at the time. It is said in *Frost v. Grizzly Bluff C. Co.*, 102 Cal. 526, [36 Pac. 929], that where a bill of exceptions merely shows instructions given and refused and the exceptions thereto, the judgment will rarely be reversed, all intendments being in favor of sustaining it. If such instructions were proper under any view of the evidence properly admissible under the issues, the action of the court must be sustained.

We find no reversible error in the record and the order is affirmed.

Shaw, J., and Taggart, J., concurred.

[Crim. No. 114. Third Appellate District.—June 17, 1910.]

THE PEOPLE, Respondent, v. THOMAS DOYLE, Appellant.

CRIMINAL LAW—BURNING “STACKS” OF HAY—CONSTRUCTION OF PENAL CODE—SCATTERED “COCKS” OF HAY EXCLUDED.—Under section 600 of the Penal Code making it a felony willfully and maliciously to burn “any stack of hay” of the value of \$25 or over, the willful and malicious burning of scattered “cocks of hay,” not gathered into any “stacks,” though of the value of \$25 or over, however it may be punished, is excluded from being considered as a felony under the terms of that section.

ID.—DISTINCTION BETWEEN A "STACK" AND "COCK" OR "SHOCK" OF HAY.

There is a marked and well understood distinction between a "stack" and a "cock" or "shock" of hay. Customarily, shortly after hay is mowed or cut, it is raked into small piles or cocks, and is thus allowed to remain until it becomes thoroughly dry or "seasoned," after which it is generally picked up and put into large piles called "stacks."

ID.—CONSTRUCTION OF PENAL STATUTE—DESCRIPTION OF PROPERTY—

GENERAL RULE.—As a general rule, where any particular article of property is mentioned in a penal statute as the subject of an offense, only such property as is usually designated by such terms can be regarded as having been intended by the legislature to be embraced in its provisions.

ID.—CHARGE OF BURNING "STACKS" OF HAY—VARIANCE—PROOF OF

BURNING "COCKS" OF HAY—MISDEMEANOR.—Under an information charging the defendant with a felony by willfully and maliciously burning "stacks" of hay of the value of \$25, in violation of section 600 of the Penal Code, and the proof shows only the burning of "cocks" or "shocks" of hay, the variance in the proof is fatal, and shows only a misdemeanor committed under section 594 of that code.

ID.—INAPPLICABLE AND MISLEADING INSTRUCTION—ABSTRACT CORRECT-

NESS—SIZE OF "STACKS."—Where the evidence shows no "stack" of hay but only the burning of "cocks" or "shocks," of the value of no more than one dollar each, an abstractly correct instruction, inapplicable to the facts that if the jury "find from the evidence beyond a reasonable doubt that the defendant did attempt to burn certain stacks of hay of the value of \$25, then you will find the defendant guilty regardless of the size of the individual stacks of hay, no matter whether they were large or small," was plainly calculated to mislead the jury.

ID.—INSTRUCTION ERRONEOUSLY REFUSED.—The refusal of the court to

instruct the jury, as requested by the defendant, as to the proper distinction between "stacks" and "cocks" of hay was prejudicially erroneous.

ID.—DUTY OF COURT UNDER PROOFS.—Under the proofs, the court should

have advised the jury to acquit the defendant.

APPEAL from a judgment of the Superior Court of Merced County, and from an order denying a new trial. E. N. Rector, Judge.

The facts are stated in the opinion of the court.

Frank H. Farrar, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

HART, J.—The information under which the defendant was prosecuted and convicted charges him with the crime of maliciously attempting to burn “certain stacks of hay, of the value of \$25 and over, the property of one W. A. Rucker,” etc.

The crime which the defendant is thus charged with having attempted to commit is defined by section 600 of the Penal Code, which section, in so far as it concerns this investigation, reads as follows:

“Every person who willfully and maliciously burns . . . any stack of hay or grain or straw of any kind, or any pile of baled hay or straw, . . . of the value of \$25 or over, not the property of such person, is punishable by imprisonment in the state prison for not less than one year, nor more than ten years.”

The appeal is from the judgment and the order denying defendant’s motion for a new trial, and the principal contention made by the appellant here is that the evidence does not sustain or correspond with the allegations of the information.

From the evidence it appears that one W. A. Rucker had under lease in the year 1909 a small tract of land in the city of Merced and on which, in the month of May of that year, he cut and raked into “cocks” about thirty tons of hay. These “cocks” were scattered about over the land and were situated a very few feet from each other.

The evidence shows that, between the hours of 8 and 9 o’clock on the evening of June 5, 1909, Rucker discovered a portion of the hay on fire; that he hastened to the field and extinguished the fire; that later on that same night another cock of hay was set on fire and that he again went to the field and, armed with shotgun, concealed himself behind a pile or cock of hay situated a distance of a few feet from the spot where the second fire occurred, his purpose being to discover, if possible, the person who evidently was trying to destroy all the hay in his field. A short time thereafter the defendant appeared in the field. He walked up to a cock of hay, stooped over it and at about this time Rucker, so he testified, “saw a lighted match or a blaze or something that he had, right between his body and the hay.” Rucker then stepped up to the defendant, placed him under arrest and turned him over to the custody of the sheriff.

The defendant, it appears, resided with his sister, whose home and premises adjoined the land on which the fire occurred.

The proven circumstances were sufficient to justify the finding of the jury that the defendant set the fire to the hay with the purpose of destroying it. But the important question presented here is, as already stated in a little different language, Does the evidence disclose that the act of the defendant, although malicious, constituted an attempt to violate the provision of section 600 of the Penal Code declaring the malicious burning of "any stack of hay" of the value of \$25 or more to be a felony?

It is plainly evident that, in order to answer the foregoing question in the affirmative, it must be satisfactorily shown that the legislature intended to include and embrace within the meaning of the phrase, "any stack of hay," as said phrase is employed in the code section, the piles of loose hay ordinarily and commonly designated as "cocks" or "shocks" of hay.

There is, as is generally known, a marked and well-understood distinction between a "stack" and a "cock" or "shock" of hay. Customarily, shortly after hay is mowed or cut, it is raked into small piles or cocks, and is thus allowed to remain until it becomes thoroughly dry or "seasoned," after which it is generally picked up and put into larger piles called "stacks." Webster, in his dictionary, thus defines a "stack": "A large pile of hay, bran, straw and the like, usually of a nearly conical form, but sometimes rectangular or oblong, contracted at the top to a point or ridge and sometimes covered with a thatch." The same author defines a "cock" of hay to be "a small conical pile of hay."

It will thus be observed that there is a wide distinction between a "stack" of hay and a "cock" of hay—a distinction equally as marked and obvious as is the difference between certain buildings, as, for example, a hotel and a private residence, or as is the difference between animals of the same species, as, for illustration, a horse and a mule.

It may be laid down as a general rule that where any particular article of property is mentioned in a penal statute, as the subject of an offense, only such property as is usually designated by such term can be regarded as having been intended by the legislature to be embraced within its provisions.

In a very early case in Ohio (*Denbow v. State etc.*, 18 Ohio, 11), the defendant was indicted and convicted under a statute making it penal "to set fire to, or burn, stacks of wheat." Nothing was said in said statute about "shocks" of wheat. Reversing the judgment of conviction, the supreme court of that state had this to say: "When things of the same kind have different names, arising from difference in size, number, age, situation, or any other circumstance, only such as are expressly mentioned by the terms generally appropriated to them can be held to have been contemplated by the legislature. The charge in this case was for burning stacks of wheat. The proof was the burning of shocks of wheat. Now, if the terms, shock of wheat, and stack of wheat, are equivalent, then the proof will sustain the indictment; but the only witness who testifies states that he considers them different. And in common parlance the two terms have a totally distinct and different signification. The shock is the term applied to the small collection and arrangement of a few sheaves together, in the field, in such manner as to protect them against the weather, for a few days, until the farmer has time to gather them into his barn, or place them in the conical pile called a stack."

It is very certain that, to sustain the judgment and order here, it would be necessary to read into the section of the code involved here language which the legislature has not inserted therein. This we cannot do without a manifest abuse of the power of courts in the construction of legislative enactments. (Code Civ. Proc., sec. 1858.)

Why the legislature did not include the act of maliciously burning "shocks" or "cocks" of hay within the penalty prescribed by section 600 of the Penal Code is a matter which need not be inquired into here. In the determination of the question decisive of the case here it is enough to know that the legislature did not do so, and that it is for that department of the government to say what wrongful acts shall incur the penalties of a felony and what acts declared unlawful shall incur those of a misdemeanor. The defendant could have been prosecuted either under the provisions of section 594 of the Penal Code or for attempting to commit the crime therein defined as a misdemeanor, and if it were important to ascertain the reason moving the legislature to omit to denounce the

act of burning "cocks" or "shocks" of hay as a felony, it may be found in the fact that, in the judgment of the lawmakers, crystallized and expressed in said section 594, punishment as a misdemeanor was sufficient for such an act.

In any event, under the foregoing views, the evidence does not sustain nor agree with the allegations of the information, and the given instructions upon the vital point, having been framed to coincide with and support an erroneous theory, were themselves necessarily erroneous and prejudicial.

For example, the following instruction which was read to the jury expresses the theory upon which the cause was presented by the people and tried by the court: "If you find from the evidence and beyond a reasonable doubt that the defendant, as charged in the information, did attempt to burn certain stacks of hay of over the value of \$25, then you will find the defendant guilty, *regardless of the size of the individual stacks of hay, no matter whether they were large or small.*" (Italics ours.) The foregoing instruction, while faultless as an abstract statement of the law, was not applicable to the facts developed by the evidence and was plainly calculated to mislead the jury. It is undoubtedly true that it would be immaterial whether a *stack* of hay is a large or small *stack*, if it is a *stack* within the meaning of that term as it is used in the statute and as it is herein shown to mean and such stack was of the value of \$25 or more. In other words, a pile of hay may constitute a *stack* within the commonly understood signification of that word as applied to piles of loose hay, notwithstanding the fact that it may be smaller in size or contain a less quantity of hay than other stacks of hay, for we do not understand that stacks of hay, in order to be such, need be of uniform size or contain a certain precise quantity of hay.

The evidence in the case at bar, however, discloses, as we have shown, that the field in which the alleged attempt to burn was made contained "cocks" or "shocks" of hay—that is, there were small piles of loose hay scattered about over the field, each of which did not contain a quantity of hay of a value exceeding a dollar. In short, it is not disputed that the piles of hay in the field at the time of the attempted burning charged here were nothing more than mere "cocks" of hay and arose, if at all, to the proportions of "stacks" simply because they were erroneously so characterized in the informa-

tion and the instructions of the court. The truth is, that there was not in the entire field a pile of hay approximately the size of a "stack," as we understand that term. Therefore, the prejudicial effect of the quoted and other instructions becomes clearly apparent when it is considered that the court, in thus addressing the jury upon the law by the light of which they were to examine the evidence and so reach a conclusion upon the question of the guilt or innocence of the defendant, in substantial effect treated the "cocks" of hay proved as *small stacks* of hay and as "stacks" coming within the contemplation and intent of the statute. In other words, the court virtually told the jury that any pile of hay, regardless of its size, constituted a "stack" of hay, and, applying this instruction to the evidence, there was, manifestly, no other alternative for the jury but to find the defendant guilty, assuming, of course, that the fact that the defendant attempted to burn a "cock" or perhaps a number of "cocks" of hay was proved to their satisfaction.

Of course, it necessarily follows that the court's refusal to give the instructions requested by the defendant defining "stacks" and "cocks" of hay and the distinction between the two, as explained in Webster's dictionary, and as commonly understood, and declaring that unless the jury found the piles of hay attempted to be burned to be "stacks" as so defined, the defendant would be entitled to an acquittal, constituted prejudicial error. The fact is, under the proofs, the court should have advised the jury to acquit.

For the reasons stated in the foregoing, the judgment and order are reversed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 643. Third Appellate District.—June 17, 1910.]

JAMES B. MARTIN, ORLO STEEL, and W. BARHAM, Respondents, v. G. E. CONDREY, Appellant.

ACTION TO REFORM AND SPECIFICALLY ENFORCE CONTRACT TO CONVEY LAND—INSUFFICIENT COMPLAINT—DEMURRER IMPROPERLY OVERRULED.—In an action in equity to reform and specifically enforce an alleged contract to convey land, where the complaint wholly omits to aver or show or to attempt to show that the consideration for which the defendant offered to sell the property involved in the contract is adequate or commensurate with the value of the property or that the contract is, as to the defendant, fair and just, as required by section 3391 of the Civil Code, it is insufficient as against a general demurrer, and a demurrer thereto was improperly overruled.

ID.—SETTLED RULE OF EQUITY—FACTS STATED MUST SHOW ADEQUACY, FAIRNESS AND JUSTICE.—It is a settled rule in equity that facts showing adequacy of consideration and, as to the party against whom the specific performance is sought, the justness and reasonableness of the contract, must not only be proved but must be also stated. This rule does not contemplate mere averments *in hac verba* that the contract is supported by an adequate consideration, and is as to the defendant fair and just; but the conscience of the chancellor must be satisfied on these points by a proper statement of the facts.

APPEAL from a judgment of the Superior Court of Siskiyou County. J. S. Beard, Judge.

The facts are stated in the opinion of the court.

Taylor & Tebbe, for Appellant.

Gillis & Gillis, for Respondents.

HART, J.—This is a suit in equity for the reformation and specific performance of a certain contract entered into between one E. Tubbs and the defendant for the conveyance to the former by the latter of certain real property situated in the town of Yreka, Siskiyou county.

The court overruled a general and special demurrer interposed to the amended complaint. The defendant declined to answer, and thereupon a judgment reforming said contract and decreeing its specific performance as so reformed was entered against said defendant.

This appeal is from said judgment.

The averments of the complaint fail to disclose any ground which would authorize or justify a decree compelling the specific performance of the contract involved in this controversy and the demurrer should, therefore, have been sustained.

The offer by the defendant to sell said property to said Tubbs is in writing, dated, "March 26, 1908," and is addressed to "Mr. E. Tubbs," and signed by the defendant. Therein the defendant offered to sell to Tubbs "all of my property in Yreka for \$1500, or the land without the building for \$1090.00 or the north half of said land for \$550.00, terms cash within 24 hours or \$50.00 to-day and balance on or before April 5th, 1908." Defendant further stipulated to "give you a good and sufficient deed at any time the money is put up within said time. I further agree to move off the house within 60 days should you take the whole of said land."

It may here be remarked that said contract was, on the thirtieth day of March, 1908, for a certain consideration, assigned and transferred by said Tubbs to the plaintiffs herein.

The complaint alleges that the contract between Tubbs and the defendant consisted of the written offer to sell to which we have referred and the acceptance of said offer "which was orally made by said E. Tubbs, at said Yreka City, county of Siskiyou, state of California, within the time stipulated by said offer for such acceptance, and accompanied by the proper tender of gold coin of the United States of America, to wit: Fifty (50) dollars"; that "at or about the same time said E. Tubbs demanded of said G. E. Condrey a conveyance of the said property without the house"; that defendant has not made nor executed "any conveyance of the said property without the house to said E. Tubbs, nor to his heirs or assigns, nor to said plaintiffs herein"; that "said plaintiffs are still ready and willing to pay the purchase money of the said property to the said defendant."

There is not a single averment in the complaint showing or even pretending to show that the consideration for which the defendant offered to sell the property involved in the contract concerned here is adequate or commensurate with the value of said property, or that the contract is, as to the defendant, fair and just.

Section 3391 of the Civil Code provides that: "Specific performance cannot be enforced against a party to a contract in

any of the following cases: 1. If he has not received an adequate consideration for the contract; 2. If it is not, as to him, just and reasonable. . . . ”

And it is the settled rule in courts of equity that facts showing the adequacy of the consideration and, as to the party against whom specific performance is sought, the justness and reasonableness of the contract must not only be proved but *averred*.

In *Agard v. Valencia*, 39 Cal. 502, it is said “that in a suit for a specific performance it must be affirmatively shown that the contract is fair and just, and that it will not be inequitable to enforce it. The court (of equity) will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression, but in such cases will leave the party to his remedy at law. It is incumbent on the plaintiff, therefore, to state such facts as will enable the court to decide whether the contract is of such a character that it would be inequitable to enforce it.”

“There are,” says the supreme court, in the case of *Stiles v. Cain*, 134 Cal. 171, [66 Pac. 232], “contracts which are perfectly valid, and which a court of equity would not set aside for fraud, mistake, or for any unfairness, but which, nevertheless, are so unfair that specific performance will not be decreed. This has always been the rule with courts of equity. They will not aid in the enforcement of a harsh and unjust contract, even though it be valid. The case cited (*Bruck v. Tucker*, 42 Cal. 546) also holds that the party seeking the relief must show, both by averment and proof, that the contract is, as to the defendant, fair and just. That the evidence must show such a case cannot be doubted, and this case distinctly holds that what must be proven on that subject must also be averred. This does not mean that it must be alleged *in haec verba* that the contract was supported by an adequate consideration, and is, as to the defendant, fair and just. These might be held insufficient, but the fact that the contract is such as will satisfy the conscience of the chancellor, in the respects mentioned, must appear from a proper statement of the facts.” (See, also, *Nicholson v. Tarpey*, 70 Cal. 609, [12 Pac. 778]; *Morrill v. Everson*, 77 Cal. 114, [19 Pac. 190]; *Windsor v. Miner*, 124 Cal. 492, [57 Pac. 386]; *Prince v. Lamb*, 128 Cal. 120, [60 Pac. 689]; *Flood v. Templeton*, 148

Cal. 374, [83 Pac. 148]; *White v. Sage*, 149 Cal. 613, [87 Pac. 193]; *Herzog v. Atchison, Topeka etc. R. R.*, 153 Cal. 496, [95 Pac. 898].)

As stated, the allegations of the complaint here do not meet the essentials of the rule as it is expounded by the foregoing authorities and therefore fall far short of justifying the relief of specific performance.

It is pointed out under the special demurrer that the complaint is defective in that its statement of the facts pleaded is uncertain in several particulars; but, obviously, it is not necessary to consider the points thus urged in view of our conclusion that the complaint fails to state a cause of action for specific performance.

The judgment is reversed.

Burnett, J., and Chipman, P. J., concurred.

[Civ. No. 813. Second Appellate District.—June 18, 1910.]

**D. I. NOFZIGER LUMBER COMPANY et al., Respondents,
v. A. SOLOMON et al., Appellants.**

MECHANICS' LIENS—INVALID CONTRACT—FAILURE TO RESERVE TWENTY-FIVE PER CENT AFTER COMPLETION.—Where a building contract fails to reserve twenty-five per cent of the contract price after the completion of the building, as required by section 1184 of the Code of Civil Procedure, and reserves only twenty per cent thereof, the contract is invalid as against the claimants of mechanics' liens, who are entitled to enforce their liens as if there were no contract, and their work had been done or materials furnished at the special instance and request of the owner of the building.

ID.—CONSTITUTIONAL ORIGIN OF MECHANICS' LIENS—LEGISLATURE REQUIRED TO PROTECT AND ENFORCE LIENS.—Mechanics' liens, under the constitution of 1879, have a constitutional origin, and the legislature is required to provide for the speedy and efficient enforcement of such liens. The provisions which it has made for a fund of twenty-five per cent of the contract price for their enforcement cannot be depleted or reduced to the injury of any lien claimant without an infringement of constitutional right.

ID.—PROOF OF ACTUAL RETENTION OF TWENTY-FIVE PER CENT INADMISSIBLE.—The request of the owners to be permitted to show that they actually retained twenty-five per cent of the contract price,

though the terms of the contract did not provide therefor, was properly denied. An unrevealed intention to retain that amount, or the actual intention to retain the same, is not a compliance with section 1184 of the Code of Civil Procedure, which requires that, by the terms of the contract, twenty-five per cent of the whole contract price shall be made payable as therein provided. Evidence of the retention of the full amount, without such a provision in the contract, was, therefore, immaterial.

ID.—PURPOSE OF VERIFICATION TO NOTICE OF LIEN.—The purpose of the verification to the notice of a claim of lien is not to prove the lien when it is sought to enforce it in the courts; but the claim filed with the recorder, which is required to be verified, is but a notice by the claimant that he intends to avail himself of his right to a lien in the particular case. The verification of the claim by his own oath, or that of some other person, is required as evidence of good faith, and a *prima facie* support to his claim for the purpose of giving such notice only.

ID.—PURPOSE OF PROOF OF RECORDED CLAIM—ESTABLISHMENT OF REQUIRED NOTICE.—The purpose of proof of the original recorded claim of liens is not to prove its contents, but to establish that notice has been given as required by law. It is entitled to admission when it is shown that it complies with the statutory requirements.

ID.—PUBLIC RECORD—ADMISSIBILITY.—If the signature and verification were sufficient to entitle it to be filed with the recorder, and it was so filed, it became a public record, and thereafter became entitled to be received in evidence, under the rules governing the admission of private writings which may become public records by recording under the statute.

ID.—OBJECTION THAT "NO FOUNDATION WAS LAID."—The objection that "no foundation was laid" for the admission of an original claim of lien, which bears the certificate of record, might cover the absence of evidence in the record that the lien was recorded.

ID.—SPECIFICATION OF PARTICULARS REQUIRED.—When an objection is made that sufficient foundation has not been laid for the introduction of a writing or other evidence, the particulars wherein the foundation is insufficient must be specified.

ID.—INSUFFICIENT OBJECTION—ABSENCE OF PROOF OF SIGNATURE OR VERIFICATION.—An objection that "no evidence other than the lien itself was offered or introduced as to the signatures of the parties or verification thereof" was properly overruled. No proof of the genuineness of the signatures to either the claim or the verification is a necessary preliminary to the admission in evidence of a lien properly verified and filed for record.

ID.—PROOF OF CONTRACT AND FURNISHING OF MATERIALS—ABSENCE OF OBJECTION.—In the absence of any objection, the statement in the claim of lien may be accepted as proof of the person to whom the materials were furnished and the value of the materials furnished or labor done under the agreement with him.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. N. P. Conrey, Judge.

The facts are stated in the opinion of the court.

R. L. Horton, for Appellants.

Scarborough & Bowen, John F. Poole, and Schweitzer & Hutton, for Respondents.

TAGGART, J.—Consolidated action to foreclose mechanics' liens. Judgment for plaintiffs, and defendant owners appeal from judgment and order denying their motion for a new trial.

The record on appeal is made up in accordance with a stipulation "that no point is made on this appeal as to any pleading, nor as to any papers in the judgment-roll, in said actions, except as herein mentioned," and consists of the findings and judgment and a bill of exceptions. The questions presented for consideration are: (1) Was the clause in the contract which provides for the retention of \$500, instead of \$625, as the final payment, the whole contract price being \$2500, a substantial compliance with the provisions of section 1184, Code of Civil Procedure, "that at least twenty-five per cent of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract"? and (2) Were the original liens filed by each of the lien claimants, upon the face of which appeared a verification in the ordinary form, entitled to be introduced in evidence, without further proof that the claims were verified?

There are earlier cases which, in principle, perhaps, support the argument of appellants that the contract shows a substantial compliance with the statute. These declarations were due to the failure of the courts to recognize the change wrought in the law relating to mechanics' liens by the adoption of the constitution of 1879. There was no special provision in the constitution of 1849, or the amendments thereto, for a mechanics' lien law. The law was therefore entirely the creature of statute, and it was during this period that our present lien law was enacted. Being continued in force so far as consistent with the provisions of the constitution of 1879, by the

express terms of section 1 of article XXII of that instrument, the courts accepted it as the means provided by the legislature in response to the constitutional mandate that "the legislature shall provide, by law, for the speedy and efficient enforcement of such liens," no new procedure having been provided. (*Germania etc. v. Wagner*, 61 Cal. 349.) The phraseology of the law, which in all of its provisions implied that the lien was of legislative creation, was not revised to meet the change caused by the adoption of section 15 of article XX of the constitution of 1879, and was and still is, grammatically at least, out of harmony with the view that the right of lien is due to the provision of the constitution that "Mechanics, materialmen, artisans and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

The recognition of the constitutional origin of the right and the true relation of the statute is much clearer in the later cases, it being said of the clause here under consideration, by Justice Henshaw in *Hampton v. Christensen*, 148 Cal. 729, 737, [84 Pac. 200, 203]: "Every provision of the laws which the legislature may enact must be subordinate to and in consonance with this constitutional provision. It will be noted that, in framing these laws, primarily designed for the protection of materialmen and laborers, the legislature has seen fit to reserve for the use of these lien claimants but one of the payments. After providing that no payment shall be made until the commencement of the work, it sets aside a fund amounting to twenty-five per cent of the contract price, to be held for thirty-five days after the completion of the building, and this fund, in case of a valid contract, is practically the only money available to meet the demands of lien claimants. Whatever may be said of other payments, this amount of money cannot lawfully be depleted or reduced to the injury of any such claimant. If it could be, it would be setting at naught the constitutional provision granting a lien for the full value of the labor done or material furnished." (See, also, *Stimson Mill Co. v. Nolan*, 5 Cal. App. 754, [91 Pac. 262]; *Goldtree v. San Diego*, 8 Cal. App. 505, [97 Pac. 216]; *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, [97

Pac. 414].) Considered in this light the statutory provisions as to the terms, form and recording of the contract become, in effect, a means provided whereby the owner may place some limit upon the liability of his property to be entirely taken to satisfy the constitutional lien. As said in the Hampton-Christensen case, the law accords the owner ample opportunity to protect himself by providing in the contract for as large a reserved payment as is necessary for every emergency. The legislature has certainly gone as far in the protection of the owner as can well be expected, when it declares that twenty-five per cent of the contract price is a sufficient reservation to cover the full value of the labor done and the material furnished, for which the constitution provides a lien.

This construction of section 1184 is in accord with the decision of the supreme court in *Burnett v. Glas*, 154 Cal. 249, [97 Pac. 423], which answers the first question adversely to appellants' contention. In that case, like in the case at bar, the amount provided to be retained by the contract was only twenty per cent of the whole contract price, and the supreme court says: "There was also a substantial departure from the provisions of section 1184 of the Code of Civil Procedure. . . . It has always been recognized by this court, in line with the express declaration of this section, that where there is a substantial departure in the contract from the provisions as to the times of payment and the reservation of at least twenty-five per cent of the contract price for at least thirty-five days after completion of the building, the property is subject to liens in favor of those doing labor or furnishing materials to the same extent that it would have been had there been no contract, and the labor and materials had been furnished at the personal instance and request of the owners."

The request of appellants to be permitted to show that they actually retained the twenty-five per cent, notwithstanding the terms of the contract were not in accordance with the provisions of section 1184, was properly denied. They did not offer to show that the lien claimants had any knowledge of this, or how this could be made available to the lien claimants against the rights of the other party to the contract, if the contract, as they contend, is valid. Upon an issue made by them the court found that the failure to provide the proper amount in the contract was not due to a mistake of law. Section 1184

provides that by the terms of the contract twenty-five per cent of the whole contract price shall be made payable, etc., and an unrevealed intention to retain or the actual retention of twenty-five per cent is not a compliance with the section. Evidence of the retention of the full amount without such a provision in the contract was, therefore, immaterial.

It is not clear how the second point made by appellants is before us on the record. The bill of exceptions in the case of the plaintiff Nofziger Lumber Company reads: "Evidence was offered on behalf of the plaintiff . . . to prove the contract under which they furnished materials to the defendant J. B. Cook as contractor, and having proved their said contract with the said defendant contractor, and that they had furnished the materials thereunder. On June 18, 1908, the said plaintiff, by and through one of its attorneys, Mr. Scarborough, offered in evidence its original claim of lien. No evidence other than the lien itself was offered or introduced as to the signatures of the parties or verification thereof. Said offer was objected to by defendants" upon the grounds "that said claim of lien is incompetent, irrelevant and immaterial and no foundation laid." The concluding portion of the lien is given, showing the value of materials furnished and balance due and the name of the claimant corporation signed thereto, "By S. T. Davison." The verification is in the usual form by Davison as the vice-president of the company.

That the purpose of the verification is not to prove the lien when it is sought to enforce it in the court may be conceded. The statement filed with the recorder which is required to be verified is but a notice by the claimant that he intends to avail himself of his right to a lien in the particular case. The verification of the claim by his own oath or that of some other person is required as an evidence of good faith and a *prima facie* support to his claim for the purpose of giving such notice only. The introduction of this claim in evidence is not to prove its contents, but to establish that notice has been given as required by law. It is entitled to admission when it is shown that it complies with the statutory requirements. If the signature and verification were sufficient to entitle it to be filed with the recorder, and it was so filed, it became a public record and thereafter became entitled to be received in evidence under the rules governing the admission of private writ-

ings which may become public records by recording under the statute. (Code Civ. Proc., sec. 1894.) The objection that "no foundation was laid" for its introduction might cover the absence of evidence in the record that the lien was recorded, but no point is made of this. When an objection is made that sufficient foundation has not been laid for the introduction of a writing or other evidence, the particulars wherein the foundation is insufficient should be specified. If the objection were limited to the grounds implied by the statement in the bill of exceptions that "no evidence other than the lien itself was offered or introduced *as to the signatures of the parties or verification thereof*," it was properly overruled. No proof of the genuineness of the signatures to either the claim or the verification is a necessary preliminary to the admission in evidence of a lien properly verified and filed. The offer of the plaintiff was to prove the contract and the furnishing of materials thereunder. In the absence of any objection, this seems to include proof of the value of the materials as specified in the contract. The record as to the other judgment lien plaintiffs is substantially the same as the record in the Nofziger case.

No error appearing in the record, the judgment and order are affirmed.

Allen, P. J., and Shaw, J., concurred.



[Crim. No. 124. Third Appellate District.—June 18, 1910.]

THE PEOPLE, Respondent, v. HARVEY E. SMITH, Appellant.

CRIMINAL LAW—RAPE—SEXUAL INTERCOURSE WITH YOUNG GIRL—PROOF OF VENUE.—On the trial of a prosecution for rape by defendant in having sexual intercourse with a female under the age of consent not his wife, it is held that, notwithstanding defendant's contention upon appeal that the venue was not proved, the proof was direct and satisfactory as to the county in which the crime was perpetrated.

ID.—EVIDENCE—EQUIVOCAL STATEMENT OF DEFENDANT—CONNECTION WITH OTHER EVIDENCE—QUESTION FOR JURY.—Evidence of a conversation with defendant in which he spoke of two sisters, and said

he "had one of them down on the bed the other night, and had felt of her, that she first fought, and finally gave way to him, and he could have had sexual intercourse with her if he had wanted to," was admissible, though he did not mention her name. Though he might have referred to either sister, yet such testimony was for the jury, and, taken in connection with the other evidence, the jury were justified in concluding that he referred to lewd conduct with the prosecutrix.

ID.—QUESTION AS TO CONDUCT WITH GIRL THIRTEEN YEARS OLD—ABSENCE OF MISCONDUCT OF DISTRICT ATTORNEY.—The district attorney was not guilty of misconduct by inquiry as to conduct of defendant with a girl thirteen years old, where the question was ruled out as not referring directly to the plaintiff, where he explained to the court that defendant made such remark without stating the name or when it occurred. It must be assumed that the district attorney acted in good faith, and believed that the evidence was relevant and referred to the prosecutrix.

ID.—DISALLOWING VIEW OF PREMISES—DISCRETION OF COURT—PREMISES FULLY DESCRIBED—PHOTOGRAPHS AND DRAWINGS.—The court did not abuse its discretion in disallowing an inspection of the premises where the crime was committed, where the premises were fully described to the jury by the witness, and photographs and drawings of them were received in evidence.

ID.—REQUEST AS TO CONVICTION ON UNCORROBORATED TESTIMONY OF PROSECUTRIX PROPERLY REFUSED—CORROBORATION—CAUTION.—The court did not err in disallowing an argumentative instruction requested by the defendant as to a conviction on the uncorroborated testimony of the prosecutrix, where there was some evidence of corroboration, and where the caution it required of the jury was sufficiently covered by the instructions given.

ID.—REQUEST AS TO FAILURE OF PROSECUTRIX TO MAKE "PROMPT AND SEASONABLE" COMPLAINT OF CRIME—INVASION OF PROVINCE OF JURY. The court properly refused a request as to the failure of the prosecutrix to make a "prompt and seasonable complaint" of the crime as involving an invasion of the province of the jury.

ID.—REQUEST AS TO "POLICY OF LAW" AS TO INNOCENT PERSONS.—The court properly refused a requested instruction as to the "policy of the law" as to innocent persons. The court is required to state to the jury the law, and not the reasons for its enactment or the nature of the public opinion which sanctions it.

ID.—REQUEST AS TO DUTY OF EACH INDIVIDUAL JUROR.—It was not necessary to give a request as to the duty of each individual juror to be convinced of the guilt of the defendant, as that was clearly implied in the several instructions given by the court as to the duty of the jury.

ID.—LAW COVERED BY CHARGE.—It may be said that every needful instruction was given to the jury to enable them to consider and de-

termine intelligently the facts bearing upon the question of the guilt or innocence of the accused.

VERDICT.—SUPPORT OF VERDICT.—It is held that the defendant was fairly tried, and that the evidence supports the verdict.

APPEAL from a judgment of the Superior Court of Tehama County, and from an order denying a new trial. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

James T. Matlock, Jr., for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

BURNETT, J.—Defendant was convicted of the crime of rape in having sexual intercourse with a female who was under the age of consent and not the wife of said defendant.

1. There is no merit in the contention of appellant that the venue was not proved. The witness, Keeran, was asked this question: "This that you have testified to occurred in the county of Tehama and state of California, did it, Mr. Keeran?" and the answer was "Yes, sir." The witness had just detailed certain occurrences at the home of Mrs. Ladd, the mother of the prosecutrix, and there was no conflict in the evidence that the offense was committed at said home. The showing could not have been more direct or satisfactory as to the county in which the crime was perpetrated.

2. Appellant claims that the trial court erred in overruling his objection to certain testimony given by the said witness Keeran. He was asked this question: "Mr. Keeran, in reference to the two Misses Ladd, the young ladies, did the defendant ever make any statement to you about having one of them down on the bed?" Without any objection he answered the question, "Yes, sir." Then he was asked: "Will you please state to the jury what that conversation was?" An objection to this was overruled and he answered: "He was speaking of the Ladd girls, and he said he had one of them down on the bed, the other night, and had felt of her and she first fought and finally just gave way to him and he felt of her and could have had sexual intercourse with her if he had wanted to." The point of the objection is that the testimony referred to de-

defendant's action with someone other than the prosecutrix, but this, we think, was for the jury to determine. He was speaking of both of the girls and said the conduct occurred with one of them, without mentioning her name. Manifestly, it might have referred to either, but in connection with the other evidence the jury were justified in concluding that he referred to lewd conduct with the prosecutrix. It may be said, also, that the answer to the question, which was not objected to, carried with it an inference as unfavorable as the subsequent question and answer.

Again, the witness was asked: "And on another occasion, during the time you were in that neighborhood and you were making your headquarters at Mrs. Ladd's, did the defendant ever make any statement to you in regard to his action with a thirteen year old girl?" The objection to this question was overruled and he answered: "Yes, he did." He was then directed to state the conversation. He was proceeding to do so when the court, interrupting, asked the district attorney, "Do you mean this girl?" and the district attorney answered, "No, sir." The court then sustained the objection and directed the jury to disregard what was said in relation to it. The district attorney, however, in further explanation, stated that the defendant made a remark about a thirteen year old girl but mentioned no name and did not state when it occurred. We must assume that the district attorney acted in good faith and believed the evidence was relevant and referred to the prosecutrix. It is often difficult to determine whether language used relates to the issue involved, and we cannot say that the question here is so plain that it must be held that the prosecuting officer, in violation of his oath of office, endeavored to deprive the defendant of a fair trial by offering testimony which he knew to be inadmissible. The cases cited by appellant on this point are quite different in their facts.

In *People v. Stewart*, 85 Cal. 175, [24 Pac. 722], evidence tending to show lewd, immoral and indecent conduct on the part of the defendant with persons other than the prosecutrix was admitted over his objection and the court very properly said: "The admission of the evidence was clearly reversible error."

People v. Elliott, 119 Cal. 593, [51 Pac. 955], is to the same effect, where evidence was admitted that the defendant had

asked other girls than the prosecutrix to go to the house of defendant to have illicit intercourse with men.

In *People v. Derbert*, 138 Cal. 467, [71 Pac. 564], the supreme court agreed with the claim of appellant that "the persistent conduct of the district attorney in asking improper questions during the trial, and making improper insinuations was such error that the case should be reversed." In the course of the discussion, it is said: "The court promptly sustained objections to all these questions, but that did not cure the error. It clearly appears that the object of the district attorney was to leave the impression upon the mind of the jury that defendant had committed other crimes, and that he had changed his name. His questions were directly in face of the rulings of the court and certainly with the knowledge that the court would not permit them to be answered. The object was to ask the questions and not to get the answers." No such imputation can be indulged here. While, in this class of cases, especially, the rights of the defendant should be scrupulously protected, we can find nothing in the conduct of the district attorney to demand a reversal of the judgment.

3. The court did not abuse its discretion in declining to direct the jury to be taken to the Ladd residence for an inspection of the premises where the offense is said to have been committed. The practice invoked by the defendant should be adopted only in exceptional cases, as it usually increases the hazard of a mistrial. The premises were fully described by the witnesses; photographs and drawings of them were received in evidence, and the court was clearly right in the opinion that a personal inspection by the jury was entirely unnecessary.

4. No error was committed by the court in refusing the instruction in reference to a conviction upon the uncorroborated testimony of the prosecutrix, for the reason that there was some corroboration. Besides, it is argumentative, and the caution that it required of the jury was sufficiently covered by the instructions which were given.

5. The requested instruction as to the failure of the prosecutrix to make "a prompt and seasonable complaint" of the crime was an invasion of the province of the jury, in assuming that her delay in making complaint was unseasonable and inexcusable and in the suggestion as to the weight and effect

of certain evidence. It was, therefore, properly refused. Similarly, the action of the court was clearly right in refusing the instruction as to the policy of the law in relation to the conviction of innocent persons. The court is required to state to the jury the *law*, not the reasons for its enactment or the nature of the public opinion which sanctions it.

It was not necessary to state that each individual juror was required to be convinced of the guilt of the defendant, as that was clearly implied in several instructions given by the court.

In fine, it may be said that every needful instruction was given to the jury to enable them to consider and determine intelligently the facts bearing upon the question of the guilt or innocence of the accused.

The defendant was fairly tried and the evidence supports the verdict. The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 11, 1910.

[Crim. No. 118. Third Appellate District.—June 18, 1910.]

THE PEOPLE, Respondent, v. ISAAC T. DAVENPORT,
Appellant.

CRIMINAL LAW—RAPE WITH GIRL UNDER AGE OF CONSENT—INSTRUCTIONS—CONSENT—PRIOR WANT OF CHASTITY.—Upon a prosecution for rape by defendant in having sexual intercourse with a girl under the age of consent, the court, after stating to the jury that her consent was immaterial, further properly instructed them that it is immaterial whether the prosecutrix was of previous chaste character at the time of the alleged offense; that want of chastity of a female under the age of consent is no defense to the charge of rape upon her, and that any statement reflecting on her previous chastity is to be disregarded.

ID.—PRIOR UNCHASTE RELATIONS NOT PROVED—DECLARATION AS TO CAUSE OF "CONDITION"—IMPEACHING EVIDENCE.—Where there was no direct evidence of prior unchaste relations between the prosecutrix and other persons, the testimony of a witness merely to an oral declaration of plaintiff that defendant was not responsible for her

"condition" was in the nature of impeaching evidence, and cannot be considered as evidence of want of chastity.

ID.—RULE AS TO IMPEACHING EVIDENCE—STATEMENT NOT PROOF OF FACT.

The rule is that impeaching evidence by a contradictory statement does not tend to establish the truth of the matter contained therein, but only tends to affect the credibility of the witness impeached thereby.

ID.—INSTRUCTION—CAUTION AS TO ORAL DECLARATIONS—MATTER OF FACT—HARMLESS COMMONPLACE.—While an instruction that the testimony of the oral declaration of a witness or party is to be received with caution is as to a matter of fact, yet it is held to be harmless as stating mere commonplace matter within the general knowledge of the jury, the giving of which is not ground of reversal.

ID.—INSTRUCTION AS TO PRESUMPTION OF INNOCENCE—PROOF—REASONABLE DOUBT.—An instruction that "the defendant is presumed to be innocent until his guilt is clearly established by the evidence," that "all presumptions of law are in favor of the innocence of persons accused of crime, and every person so accused is presumed to be innocent until the contrary is shown, and until his guilt is established by the evidence in the trial of the case, and this presumption of innocence remains with the defendant in every stage of the trial until it is overcome by the evidence," is not objectionable as using the word "shown" instead of "proved," nor for the omission of proof "beyond a reasonable doubt," where the law of "reasonable doubt" is fully stated in other instructions, so that the jury could not be misled as to the measure of proof required to overcome the presumption of innocence.

ID.—EVIDENCE—CONCEALMENT OF WITNESS BY DEFENDANT—QUESTION FOR JURY.—Where the district attorney introduced a witness who was at defendant's house when the offense in question was committed, and learned something about it from defendant, who stated that defendant directed him not to tell anything about the story, but to say "no" to everything asked of him, and that defendant sought to have him conceal his identity, but told his father "that the witness got into trouble, and he had to keep him out of the way," it was a question for the jury to determine whether the testimony indicated the purpose of defendant to suppress testimony against himself, or to shield the witness from trouble.

ID.—CROSS-EXAMINATION—TROUBLE WITH GIRL AT DEFENDANT'S HOUSE. On cross-examination, defendant had the right to show that the witness had trouble with a girl at defendant's house, and that defendant's concealment of the witness was to shield him from that trouble.

ID.—PREJUDICIAL RE-EXAMINATION—INSTIGATION OF TROUBLE BY DEFENDANT.—Such cross-examination did not open the way for a re-examination to go into the details of such collateral and distinct offense at defendant's house, on the part of the district attorney,

in a manner highly prejudicial to defendant, by showing that defendant instigated and encouraged such offense, and told the girl to go upstairs with the witness. Such re-examination grossly transgressed the rights of the defendant.

ID.—PROPER CROSS-EXAMINATION OF DEFENDANT—TEST OF MEMORY.—

Where defendant claims an alibi in spending the night in question on an oil barge, the district attorney, on cross-examination, had the right to test his memory by asking as to his movements on the nights previous and subsequent to the date of the offense, and to ask him if it was not on one of those nights that he was on the barge. The prosecution may seek, on cross-examination, to bring out evidence tending directly to explain, qualify or contradict the defendant's testimony.

ID.—CROSS-EXAMINATION OF PROSECUTRIX—VISIT TO DOCTOR WITH DEFENDANT—PREJUDICIAL ERROR.—

Where, on direct examination of the prosecutrix, it was proved that she visited a doctor with the defendant, the defendant had the right to show on cross-examination that she had had intercourse with another person, not to prove that she was unchaste at the time of the alleged offense, but to resist the inference that the defendant was responsible for her condition, and defendant was entitled to the utmost latitude, on cross-examination, to rebut that inference, and it was prejudicial error to disallow such right.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—PREJUDICIAL COMMENT ON COLLATERAL OFFENSE.—

It was misconduct of the district attorney to comment on defendant's instigation of the collateral offense, which was improperly admitted, and was calculated to arouse bitter resentment against defendant on the part of the jury, and to disqualify them to view dispassionately and fairly the evidence against the defendant upon the particular charge in the information.

ID.—RIGHT OF DEFENDANT TO FAIR CONVICTION.—

If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent.

ID.—SUFFICIENCY OF INFORMATION—OFFENSE CHARGED IN LANGUAGE OF STATUTE—WORDS NOT REQUIRED.—

The information for rape, in this case, conforming to the language of the statute defining it, was sufficient, and a demurrer thereto was properly overruled. It was not necessary to use the word "feloniously," nor to allege that the act was "willfully" done. When it is alleged that a person does an act, it implies willfulness.

ID.—SUPPORT OF VERDICT.—

The evidence was sufficient to support the verdict. The testimony of the prosecutrix was sufficient for that purpose, though there was additional evidence lending aid to the inference of guilt.

ID.—REVERSAL ON OTHER GROUNDS.—

On the other grounds above stated, the verdict cannot be upheld.

APPEAL from a judgment of the Superior Court of Yolo County, and from an order denying a new trial. N. A. Hawkins, Judge.

The facts are stated in the opinion of the court.

J. R. Hughes, and Arthur C. Huston, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

BURNETT, J.—Appellant seeks a reversal of the judgment and the order denying his motion for a new trial upon the grounds that the court committed error in the giving and refusing of instructions and in its rulings upon the admissibility of evidence during the trial, that the district attorney was guilty of prejudicial misconduct, that the demurrer to the information was improperly overruled and the evidence is insufficient to support the verdict.

1. The portion of instruction No. 4 given by the court, to which criticism is directed, reads as follows: "It is wholly immaterial whether Martha J. McManus, the prosecuting witness, was of previous chaste character or not, at the time of the alleged offense. Want of chastity of a female under the age of sixteen years is no defense to a charge of rape upon her. Any statement reflecting on the previous chastity of Martha J. McManus is to be wholly disregarded by you." It is admitted that, "as an abstract proposition of law these expressions are probably correct," but it is contended that they were erroneous by reason of the fact that certain evidence admitted by the court as to improper relations between the prosecutrix and parties other than the defendant was material in the determination of the question whether the act charged against the defendant in the information really occurred. But it is apparent that the court was dealing with the particular phase of the law involved in the suggestion that it might be no crime to have sexual intercourse with a female under the age of consent if she was of previous unchaste character. The court had stated that it was immaterial whether the prosecutrix had consented or not to the act of intercourse, and then proceeded to declare, substantially, that "for the same reason" it was im-

material what was her previous character as to the element in question, and therefore any statement reflecting on her previous chastity should be disregarded.

But appellant is mistaken in the contention that the court admitted evidence of the relations existing between the prosecutrix and persons other than the defendant. Mrs. Manchester testified that the prosecutrix had stated to her that the defendant was not responsible for her "condition." What was meant by "condition" does not appear, but attributing to it the scurrilous signification contended for, there is no evidence as to when the "condition" originated, and, besides, it is only impeaching testimony and therefore could not be considered as evidence of the want of chastity. The rule is that "impeaching testimony does not establish, or in any way tend to establish, the truth of the matters contained in the contradictory statements." (3 Jones on Evidence, 861.) The purpose of such testimony is, of course, as the term implies, to affect the credibility of the witness impeached and an instruction to that effect would have been proper had appellant desired it.

The court instructed the jury as follows: "I instruct you that the testimony of the oral declaration or admission of a witness or party should be viewed with caution." It is the contention of appellant that this has been before the supreme court many times for construction and it has been held to be in conflict with section 19 of article VI of the constitution of the state, which provides that: "Judges shall not charge juries with respect to matters of fact; but may state the testimony and declare the law." In support of the position these cases are cited: *Kauffman v. Maier*, 94 Cal. 269, [29 Pac. 481]; *People v. Rodley*, 131 Cal. 240, [63 Pac. 351]; *People v. Wardrip*, 141 Cal. 229, [74 Pac. 744]; *People v. Buckley*, 143 Cal. 375, [77 Pac. 169]; and *Gross v. Steiger Terra Cotta etc. Works*, 148 Cal. 155, [82 Pac. 681]. Appellant seems to place a proper construction upon those decisions. It is equally true, however, as admitted by appellant, that these authorities "take the view that such an instruction is harmless, for the reason that 'it states mere commonplace matter within the general knowledge of the jury.' " Indeed, the language used in *People v. Wardrip*, 141 Cal. 229, [74 Pac. 744], is that the instruction "states a mere commonplace

within the general knowledge of jurors; and we do not think that either the giving or refusing of such an instruction would warrant a reversal." It may be, as insisted by appellant, that upon further consideration, the supreme court will hold that such an instruction is not only violative of the constitution but also prejudicial to the defendant, but the propriety of our declination to anticipate and forestall such a decision must be apparent.

Some of appellant's objections to instruction No. 8 seem quite hypercritical. Therein the jury were told that "The defendant is presumed to be innocent until his guilt is clearly established by the evidence. All presumptions of law are in favor of the innocence of persons accused of the commission of crime, and every person so accused is presumed to be innocent until the contrary is shown and until his guilt is established by the evidence in the trial of the case, and this presumption of innocence remains with the defendant at every stage of the trial unless it has been overcome by the evidence." The use of the word "shown" is criticised, but it is apparent that it was employed in the sense of "proved." It was not necessary for the court to repeat the expression "beyond a reasonable doubt," as in other portions of the charge the jury were told repeatedly that the prosecution must prove the charge to a moral certainty and beyond all reasonable doubt. Upon this point one of the instructions was: "Before you can convict the defendant you must be satisfied from the evidence that he is guilty beyond all reasonable doubt. A bare preponderance of the evidence in support of a criminal accusation against the defendant is not sufficient to warrant his conviction, but on the trial of this and all other criminal causes, the guilt of the defendant must be established to the satisfaction of the jury to a moral certainty and beyond a reasonable doubt, or he should be acquitted." They were further instructed that "the burden of the proof never shifts, but remains upon the prosecution throughout the whole case to prove the defendant guilty beyond a reasonable doubt." The jury could not, therefore, have understood from the criticised instruction that a less degree of proof was required of the prosecution than "beyond a reasonable doubt."

There is some ground for the objection to the instruction in reference to its statement of the presumption of innocence.

The language is not as clear as it should be, but we think the jury could not have been misled thereby.

In *People v. McNamara*, 94 Cal. 514, [29 Pac. 953], cited by appellant, the instruction was: "And the presumption of innocence goes with him all through the case, *until it is submitted to you.*" The supreme court properly said that "the presumption of innocence does not cease upon the submission of the cause to the jury, but operates in favor of the defendant, not only during the taking of the testimony, but during the deliberations of the jury, until they have arrived at a verdict." But appellant's contention is directly answered by the case of *People v. Arlington*, 131 Cal. 231, [63 Pac. 347]. The language there, being almost identical with what we have here, was, "and it is a presumption that abides with him throughout the trial of the case until the evidence convinces you to the contrary beyond all reasonable doubt." In commenting upon this language and in reply to the suggestions of appellant, the supreme court said: "We do not think the language conveyed the impression that the presumption ceased to operate at the close of the evidence of the prosecution or at any time before the jury had finally determined upon a verdict. The court meant, and we think must have been by the jury understood to mean, that the presumption remained to the last with the defendant and until in their deliberations upon the evidence they became convinced of his guilt. When the jury reached that conclusion on the whole evidence and beyond a reasonable doubt, of course, the presumption disappeared and should disappear." The instruction upon this subject requested by defendant, it may be remarked, has been approved by the supreme court as an entirely accurate statement of the law and might well have been given by the trial judge, but, as already declared, we think the jury were substantially so instructed.

2. One George Blohm was allowed to testify to certain movements made by him upon the contention of the district attorney that they were directed by the defendant for the purpose of having the witness concealed that he might not be called to testify at the trial. It appears that the witness was at Mr. Davenport's house at the time the offense is claimed to have been committed and acquired knowledge of certain facts incriminating the defendant. He testified that he was di-

rected by Davenport "not to tell any more about the story and say no to everything they would ask me," and also "to change my name and say it was George King," and furthermore that the defendant went to Roseville and brought the witness down to Sacramento and directed him to conceal his identity in crossing the Sacramento river and they went together to San Francisco, and defendant told the father of witness that "I got in some trouble up here and he had to send me to Roseville and keep me out of the way."

It was for the jury to determine whether this testimony indicated a purpose on the part of defendant to suppress testimony against himself. Any act or declaration on his part in pursuance of that object, it is admitted, would be admissible; and while the testimony thus far detailed of the witness Blohm might be construed as indicative of defendant's desire to shield said Blohm, it was for the jury to determine whether that was the motive of defendant or whether he was trying to further his own exculpation. The evidence was probably admissible, since a rational inference might be drawn from it that defendant thereby manifested a consciousness of guilt.

The witness was then asked the question: "Had you been in trouble?" and he answered, "No, sir," and then he qualified the answer by adding, "Not at Roseville, no." On the cross-examination he said the trouble he was in related to his conduct with Gladys Bryant at Mr. Davenport's house. On the redirect examination he was permitted to state, over objection, that the defendant was present when the incident occurred with Gladys Bryant, and that he told the girl to come upstairs. The witness was persistently questioned in regard to the matter by the district attorney, and he stated quite positively that the defendant encouraged and advised the unseemly conduct on the part of the witness and the said Gladys Bryant. The evidence was admitted on the theory, as stated by the court, that "the matter was brought out on cross-examination as to the cause of his trouble, and the cause of the trouble having come in, it is admitted solely for the purpose of explaining the trouble." But we think the prosecution was allowed to go too far. The direct examination was for the purpose of showing that the defendant endeavored to conceal the witness to prevent him from giving adverse testimony on the present charge. During this examination it devel-

oped that the defendant had told the father of the witness that the latter had gotten into trouble and that on this account he sent the witness to Roseville and kept him out of the way. It was certainly proper for the defendant, on cross-examination, to show by the witness that this statement was true, that he did have trouble and that it was on this account that the defendant sought to conceal him. This did not open the door for a recital, at the instance of the district attorney, of the details of that separate offense in a manner so calculated to prejudice the defendant. It was entirely collateral to the main question, which was whether the boy's trouble or the present charge against the defendant was the moving cause of the so-called attempt to conceal said witness. It was not the occasion for explaining the boy's trouble in the sense of permitting an inquiry beyond its general nature, and the rule invoked did not sanction evidence of a separate offense which could not fail to be of decisive importance in the estimation of the jury. If the evidence had been offered on the direct examination of the witness no one would deny that it should have been rejected. As presented it was no less objectionable. It is within the principle announced in *People v. Fong Chung*, 78 Cal. 174, [20 Pac. 396], and *People v. Altmeier*, 135 Cal. 82, [66 Pac. 974]. If the jury believed the testimony of Blohm, the effect upon their minds can be easily imagined. It would require little, if any, additional evidence to induce a conviction of defendant.

It is undoubtedly true, as said by the supreme court in *People v. Baldwin*, 117 Cal. 249, [49 Pac. 187], that "In this class of prosecutions the defendant, owing to the natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence, that he should be given the full measure of every legal right in an endeavor to maintain his innocence." Scarcely anything could more fully arouse the just indignation of the jury or awaken a spirit of resentment against the defendant than such a recital as was given by said witness. We cannot but feel that the defendant's rights were grossly transgressed in this respect.

There was no error committed in the cross-examination of defendant. Complaint is made that the district attorney was

permitted to ask him as to his movements at other times than the occasion involved in the charge. The questions were limited, however, to the preceding and the succeeding night. This was entirely proper to test the accuracy of his memory as to where he was at the time of the alleged offense and also to throw a side light upon the validity of his explanation of his movements on the said night of September 30th. He had stated in the direct examination that he had spent that night on the oil barge down the river, and he had done so because he had seen some tramps near the place and he was afraid that they might steal something. Of course, it would have been proper for the district attorney to ask him if it were not the night before or the night after instead of the night in question that he stayed on the barge. This was the effect of the cross-examination, and besides, the answers disclosed nothing prejudicial to the defendant. There is no doubt that the prosecution may seek, upon cross-examination, to bring out evidence which tends directly to explain, qualify or contradict his testimony. (*People v. Arrighini*, 122 Cal. 127, [54 Pac. 591].)

On the direct examination of the prosecutrix the district attorney asked this question: "Did you prior to that time [the arrest of defendant] go with Mr. Davenport to a doctor's office in Sacramento?" and the witness answered, "Yes, sir." No inquiry was made as to the purpose of the visit or as to what occurred there, but it would seem that only one inference—not necessary to state here—could be drawn from the testimony. On cross-examination it was sought to show by the witness that on the 30th of September—at the time when the offense is charged against the defendant—she had intercourse with another person and she was further asked the question: "After going into the front room, Mrs. Manchester said to you, 'Martha, who was it got you in the fix?' You says, 'I don't know.' Mrs. Manchester says, 'Was it Del Lawrence or any of his company?' You said, 'No.' Mrs. Manchester said, 'Is it the man with the glasses?' You said, 'No.' Mrs. Manchester said, 'Is it Mr. Davenport?' You said 'No.' Mrs. Manchester said, 'Haven't you any idea who it was, Martha?' You said, 'You know who it was, it was Gussie Deuche.' Were these things said?" The questions were answered but after some discussion the court virtually excluded

the testimony from the consideration of the jury, stating, "You can ask any question in regard to any act or contradiction of any act of this defendant, but I will exclude the testimony in reference to any condition of the little girl." As we have already seen, the evidence would not be admissible for the purpose of showing her unchastity at the time of the alleged offense, but if it had a logical tendency to rebut any unfavorable inference against the defendant that might be drawn from any act testified to on the direct examination, it should have been admitted for that purpose. Indeed, that was the ground upon which defendant bases his contention that it was proper cross-examination, stating to the court: "Your honor has permitted evidence to go in here that this defendant took this girl to a doctor, the district attorney will argue from that he took her there from an ulterior motive, and that is the inference to be drawn. Haven't we a right, on cross-examination, to show, as against her testimony on that point, that immediately and at that time she denied that Davenport was responsible for her condition, and if she denied that Davenport was responsible for her condition, isn't that legitimate testimony for us to take before the jury to argue that this evidence of her going to the doctor is of no detriment to us?" The answer of the district attorney to this contention was: "We haven't proved any evidence in this case that this girl was in any condition whatever." But the jurors, not possessing the technical skill, perhaps, of the district attorney in making nice distinctions or in turning phrases, would not be slow to conclude as to what her condition was that seemed to make it necessary for the defendant to take her to see a doctor, and the defendant should have been allowed the widest latitude to rebut the unfavorable inference necessarily drawn from said testimony.

3. Appellant complains bitterly of the conduct of the district attorney in asking improper questions and in transgressing the limits of official decorum in his argument to the jury, thereby depriving defendant of a fair and impartial trial.

Everyone familiar with the execution of the criminal law knows that to convict the guilty when ably defended by attorneys of high standing at the bar and in the community, the district attorney must be not only a man of consequence

but he must exhibit industry and zeal commensurate with the importance of the case and the gravity of the opposition, but he should, of course, be mindful of the rights of the defendant and endeavor to maintain that equipoise of judgment and demeanor so becoming to one engaged in the pursuit and administration of justice.

The only specification in this regard, though, that we consider of sufficient importance to notice is the comment made by the district attorney carrying the implication that the defendant was guilty of another offense in his treatment of the witness George Blohm. The remarks were calculated to arouse the most bitter resentment on the part of the jury and to disqualify them to view dispassionately and fairly the evidence against the defendant upon the particular charge in the information.

It is true, as said in *People v. Wells*, 100 Cal. 459, [34 Pac. 1078], that "If a defendant cannot be fairly convicted he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent."

4. The demurrer to the information was properly overruled. It was not necessary to use the word "feloniously," as the offense was described in the language of the statute. (*People v. Olivera*, 7 Cal. 403; *People v. Murray*, 10 Cal. 309; *People v. Garcia*, 25 Cal. 333.) Nor was the district attorney required to aver that the act was "willfully" done. When it is alleged that a person does an act it implies willfulness.

5. There is no merit in the claim that the evidence is insufficient to support the verdict. The testimony of the prosecutrix was sufficient for that purpose. There was also additional evidence lending aid to the inference of guilt, but for the reasons stated we cannot uphold the verdict.

The judgment and order are reversed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 11, 1910.

[Civ. No. 695. Third Appellate District.—June 20, 1910.]

**P. G. PETERSON, Appellant, v. ANNABELL McDONALD,
Respondent.**

DEED—CONVEYANCE OF FEE—RESERVATION—USE OF WELL WATER—RENTAL—PERSONAL COVENANT.—Where by deed the plaintiff granted the fee of land to the defendant, without restrictions, qualifications, conditions or exceptions, and containing the words, "Reserving, however, to the parties of the first part, the right to use the water from above-mentioned property for their dwelling-house adjoining said property on the north, provided that said parties of the first part shall pay to said party of the second part the sum of fifty cents per month as rental for said water so long as said first parties continue to use the same," such reservation is not a covenant running with the land, but constitutes only a personal agreement, which could not be specifically enforced.

ID.—SUIT FOR INJUNCTION—PLEADING—CAUSE OF ACTION AND JURISDICTION NOT SHOWN.—An injunction will not lie to prevent the breach of a contract which cannot be specifically enforced; and a complaint in an action upon the personal contract embodied in the reservation contained in the deed from plaintiff to defendant, and alleging the shutting off of the well water from plaintiff, and a threat to withhold the same permanently, and seeking a preliminary mandatory injunction requiring defendant to restore the water to the use of the plaintiff, and for a permanent injunction to restrain defendant from obstructing plaintiff's use of the water, states no cause of action for an injunction, and shows no jurisdiction to grant any equitable relief.

ID.—RELIEF SOUGHT REQUIRING PERSONAL SERVICES.—If a decree were framed according to the averments and prayer of the complaint, its effect would be to compel the defendant to perform personal services, which cannot be done. He would be required to keep the well in order for plaintiff's use, and to rehabilitate and repair the machinery when out of order, for that purpose, or incur the penalty of violating the injunction.

ID.—REMEDY OF PLAINTIFF LIMITED TO DAMAGES FOR BREACH OF CONTRACT.—The sole remedy for plaintiff for violation of the personal agreement is to recover damages for breach of the contract.

ID.—DAMAGES NOT RECOVERABLE IN SUPERIOR COURT—DEMURRER PROPERLY SUSTAINED.—Where the sole amount of damages stated in the complaint for the breach of the contract is in the sum of \$25.50, the superior court has no jurisdiction of a separate cause of action to recover the same; and since the court had no equitable jurisdiction of the subject matter of the action, a general demurrer to the

complaint, and a special demurrer thereto for want of jurisdiction in the superior court of the subject matter of the action, were properly sustained on both grounds.

APPEAL from a judgment of the Superior Court of Humboldt County. E. W. Wilson, Judge.

The facts are stated in the opinion of the court.

Henry L. Ford, and Adam Thompson, for Appellant.

J. H. G. Weaver, for Respondent.

HART, J.—The trial court sustained a demurrer to the third amended complaint without leave to amend, and rendered and caused to be entered judgment against plaintiff and in favor of defendant for her costs.

The demurrer was both general and special, the latter challenging the court's jurisdiction of the "subject matter of said action, or of the subject of said action."

The appeal is from the judgment so rendered and entered.

The action grows out of a transfer of a certain piece of real property situated in the city of Eureka, Humboldt county, by the plaintiff to the defendant.

The complaint alleges that the plaintiff, on the thirty-first day of March, 1905, was the owner in fee of a piece or lot of land in said city of Eureka, the same being one hundred and twenty feet in length and an equal number of feet in width; that situated on said land were two dwelling-houses; that on said day he conveyed to the defendant a portion of said land, the land so conveyed being sixty feet in width by one hundred and twenty feet in length, and upon which one of said dwelling-houses was situated; that plaintiff retained the remaining portion of said land (fifty-eight feet by one hundred and twenty feet in dimensions), on which the other dwelling-house was situated, and where, with his family, he intended to and did reside after the date of the transfer of a portion of said land to defendant, and that on the land so retained by him there also resided, during some of the time mentioned in the complaint, certain tenants or parties to whom he had leased said premises. It is further alleged that on the portion of the land sold to defendant there were and had been for a long time prior to the date of the sale and execution of the conveyance

of said land to defendant, "a water well, a structure containing a water tank and a windmill and pump connected therewith, used for the purpose of filling said tank with water from said well, which said water is particularly clear, pure and healthful and containing superior qualities for cooking, washing and drinking; that water from said tank was at all said times used to supply both said dwelling-houses and premises upon which they were situated with water, and said strip fifty-eight feet wide off of the north part of said land (the part retained by plaintiff) was and is supplied with water from said tank by a service pipe running from said land comprising the strip sixty-two feet off the south part of said land, . . . "; that said portion of said land retained and owned by plaintiff "never has had at any time of the times herein mentioned, nor has it now, a well thereon or provided with any other means of obtaining water thereon, or supplying water for said dwelling-house thereon except as above set forth." It is averred that, as a part of the consideration for the sale and conveyance to the defendant of the land on which said well is situated, the plaintiff expressly reserved in the deed of conveyance the right to use for domestic purposes, and to that end have carried to his land, by means of a pipe connected therewith, water pumped from said well; that by virtue of the terms of said reservation water pumped into the tank situated near said well and on the said premises of defendant "has been used in said dwelling-house of plaintiff when required, and he has paid for all water used by him for said dwelling-house up to March 1, 1906"; that, on said last-mentioned date, "she, said defendant, without cause or excuse, against the will of plaintiff, shut off the water from flowing in said pipe from said tank to his said dwelling-house, and ever since has, and now prevents the flow of water from her said tank to his said dwelling-house; and plaintiff is informed and believes and alleges that defendant has threatened to keep said water shut off permanently from said dwelling-house and not to allow the use of it again therein." It is further alleged that the plaintiff, on March 2, 1906, and on March 3, 1906, tendered to defendant the sum of fifty cents as payment in advance for the use of said water for said month of March, said amount being the sum stipulated in the said reservation for which the plaintiff was to have the use of said water. Plaintiff alleges

that he "has been put to great cost, all to his great damage, in the sum of \$25.00," by reason of defendant's conduct in turning the water from the pipe leading to his premises, and further declares that pecuniary compensation alone would not constitute an adequate remedy in view of the rights to which he claims to be entitled under the terms of the reservation contained in the deed executed by him to defendant.

The relief demanded by the plaintiff in the prayer of the complaint is, first, for a preliminary mandatory injunction requiring defendant to remove any obstruction to the flow of water from the tank into the pipe leading to plaintiff's dwelling-house, and secondly, for a permanent injunction compelling defendant to perpetually refrain from obstructing plaintiff's use of said water, and for the damages alleged.

The deed from plaintiff to the defendant is made a part of the complaint, and the reservation therein contained, and on which this controversy hinges, reads as follows: "Reserving, however, to the parties of the first part, the right to use the water from above-mentioned property for their dwelling-house adjoining said property on the north, provided that said parties of the first part shall pay to the said party of the second part the sum of fifty cents per month as rent for said water so long as said first parties continue to use the same."

The demurrer was properly sustained on both the grounds upon which it was urged.

Manifestly, the alleged "reservation" contained in the deed amounts only to a personal contract by the terms of which the defendant agreed to sell and furnish the plaintiff with water for use for domestic purposes, and is not, in our opinion, a contract that would be specifically enforced. There is no claim, and, obviously, none could be successfully maintained that, so far as the use of the water is concerned, the "reservation" is a covenant running with the land. There is nothing in its language which even remotely indicates that it was intended to bind the land. The plaintiff granted to the defendant the fee without restrictions, qualifications, conditions or exceptions; and, as stated, the alleged reservation constitutes only a personal agreement between the parties which could just as well have been evidenced by some writing *dehors* and independent of the deed.

The allegations of the complaint as well as the prayer call for a restoration of the flow of the water from the tank into the pipe, thence to plaintiff's premises, and for a decree permanently enjoining defendant from obstructing the flow of said water through said pipe. Thus, necessarily, the defendant would not only be required to perpetually maintain the well and the pump and the other apparatus used for pumping the water, but would be compelled to keep the same in such order as to cause water from the well to be pumped into the tank and thus supply the plaintiff, so far as the plant maintained intact could do so, with water necessary for his purposes as contemplated by the "reservation." The effect of the decree, if framed in accordance with the tenor of the averments and prayer of the complaint, would, in other words, be to compel the performance of personal services, which cannot be done. (Civ. Code, sec. 3390.) If, for example, the pumping machinery should be destroyed or in any manner become impaired so that it could not pump water into the tank, the defendant would be required to rehabilitate or repair the machinery so that she could furnish plaintiff with water or otherwise incur the penalty consequent upon a violation of the injunction.

Of course, it is well understood that injunction will not lie to prevent the breach of a contract which would not be specifically enforced.

Plaintiff had available to him adequate compensatory relief. It may be that the complaint sufficiently states a cause of action for damages for a breach of the contract to stand against the attack of a general demurrer, and if so, and had the damages claimed and alleged been such in amount as to give the superior court jurisdiction of the action, the demurrer should and would perhaps have been overruled. But the sum in which the plaintiff alleges that he has suffered damage by the act of the defendant does not, obviously, amount to enough to invest the court with jurisdiction of the action.

Judgment affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 819. Second Appellate District.—June 20, 1910.]

J. H. RAMBOZ, Respondent, v. CHARLES STANSBURY
and F. U. NOFZIGER, Appellants.

CORPORATION—INDORSEMENT OF NOTE TO BANK BY GENERAL MANAGER AND SECRETARY—SEAL AND RESOLUTION NOT ESSENTIAL.—The possession by a bank of a note indorsed to it for value before maturity by a corporation payee, signed by its vice-president and secretary, together with uncontradicted evidence that the vice-president was its general manager, with full control of its business, and that it was the custom of the corporation to sell its notes to banks, was sufficient to show that the indorsement to the bank was in the usual course of business; and from these facts the necessary authority to indorse the note will be inferred, notwithstanding the absence of the seal of the corporation and the failure to prove a formal resolution of the directors confirming it.

ID.—PRESUMPTION OF RIGHT ACTION BY CORPORATION.—Under the operation of the presumption of right action in dealing with negotiable securities, an assignment by a corporation of a note held by it is presumed to be valid until the contrary appears, and the force of the presumption in favor of its general power to assign such instruments is that its officers exercised the power rightly in the particular instance, or in the ordinary course of its business. In the absence of any evidence to the contrary, the holder of the note of a corporation, under its indorsement by its officers, will be presumed to be the owner thereof.

ID.—PRIMA FACIE TITLE NOT REBUTTABLE BY MAKERS.—The general rule appears to be that, in the absence of *mala fides*, the plaintiff's *prima facie* title to the indorsed note of a corporation, by reason of possession, is not subject to rebuttal in an action against the makers, so long as they are protected from further claim by payment of the judgment recovered against them.

ID.—FORECLOSURE OF PLEDGED STOCK—INTEREST OF BANK BY INDORSEMENT—AGENCY OR TRUST OF PAYEE—SUPPORT OF FINDING.—In an action by a collector for the bank to foreclose stock pledged by the makers of the note to the payee, and to obtain judgment for the residue, in which the findings and judgment were for the plaintiff, it is immaterial whether there is any evidence to sustain a finding that the stock pledged was transferred to the bank, as none was necessary, since the indorsement and transfer of the note by the payee carried the collateral security with it. The right thereto existed in the indorsee, independent of actual delivery thereof, by virtue of being the holder of the note. If the payee, after selling the note, should continue to hold the collateral, he would hold it as agent or trustee for his assignee.

ID.—HARMLESS FINDING.—If it be conceded that the transfer of the note was not sufficient evidence of the transfer of the collateral, nevertheless the finding of transfer thereof to the bank, if unsupported by the evidence, is harmless to the makers appealing.

ID.—COUNTERCLAIM AGAINST PAYEE—INSUFFICIENT DEFENSE—NOTICE OF FACTS NOT SHOWN—EVIDENCE PROPERLY EXCLUDED.—Where the answer set up a counterclaim against the payee of the note, alleging that it was given in settlement of an account, and that the amount thereof was, by mistake and inadvertence, \$2,700 in excess of the amount due, but failed to allege that the bank which paid the full face of the note before maturity had any notice of such fact, or that plaintiff took with any knowledge thereof, the court properly refused to allow proof thereof as a defense to the action.

ID.—GENERAL RULE AS TO WANT OR FAILURE OF CONSIDERATION—SPECIAL PLEADING—NOTICE TO ASSIGNEE.—The general rule is that absence or failure of consideration is available as a defense to an action by an assignee of a note only by specially pleading it, and showing by additional allegations that the assignee is a holder with notice of the facts.

ID.—PARTIAL FAILURE OF CONSIDERATION—INSUFFICIENT PLEADING—NOTICE TO BANK NOT AVERRED—INADMISSIBLE EVIDENCE.—In the absence of an allegation that the bank had notice of the facts set up in the pleading at the time when the note was transferred to it, a counterclaim based upon a partial failure of consideration constitutes no defense to the action, and evidence was inadmissible in support thereof.

ID.—AMENDMENT OF COMPLAINT TO CONFORM TO PROOFS—DISCRETION.—After the evidence was closed, the court had discretion to permit an amendment to the complaint to conform to the proofs introduced upon the trial, without notice to the defendants, it being stipulated that the allegations of the amendment should be deemed denied. The subject matter of the amendment having been proved at the trial, it would have been idle to have required notice thereof to defendant; and the discretion in allowing it was not abused, especially where it clearly appears that in no event could the rights of defendants be prejudiced by the ruling.

APPEAL from a judgment of the Superior Court of Los Angeles County. George H. Hutton, Judge.

The facts are stated in the opinion of the court.

Scarborough & Bowen, for Appellants.

Percy Wilson, and Constan Jensen, for Respondent.

SHAW, J.—On July 12, 1906, the defendants made and delivered to the Consolidated Lumber Company, a corporation, their certain negotiable promissory note for \$13,500, payable to its order on or before January 1, 1908. To secure the payment thereof they deposited in pledge with the Consolidated Lumber Company two hundred and fifty shares of the capital stock of the Western Lumber and Mill Company. Plaintiff sues as the indorsee of an intermediate indorsee of the note to foreclose the lien upon the stock so pledged to secure the payment of the note. Judgment was rendered for plaintiff, and defendants appeal therefrom upon bill of exceptions.

The answer admitted the execution of the note, but denied the indorsement and transfer thereof to plaintiff.

The court found that on May 1, 1907, the Consolidated Lumber Company, payee in said note, did, in the ordinary course of business, duly indorse, transfer and deliver the same to the Merchants' National Bank of Los Angeles, which received it in good faith and in the ordinary course of business, paying therefor \$13,500; that at the same time the Consolidated Lumber Company transferred and delivered to said bank the stock so pledged to secure the payment thereof; that prior to the institution of this action the bank indorsed the note and transferred the same, together with said stock so pledged to secure the payment thereof, to plaintiff herein. Appellants attack these findings, assigning as grounds therefor that they are unsupported by the evidence.

It is conceded that the note was transferred to plaintiff by the bank merely for the purpose of collection. The question presented is whether the note was assigned to the bank by a valid indorsement thereof. The indorsement is sufficient in form, and on behalf of the Consolidated Lumber Company is signed by the vice-president and secretary. Nevertheless, appellants insist that, in the absence of the corporate seal, a resolution of the board of directors authorizing the indorsement for and on behalf of the corporation was a prerequisite essential to a valid transfer of the note to the bank. There is no merit in this contention. Possession of the note, indorsed in due form, together with uncontradicted evidence that on behalf of the Consolidated Lumber Company

it was, in the absence of the president, indorsed by the secretary and the vice-president, the latter of whom was also general manager, and as such had full control of the business of the corporation, which on May 1, 1907, received from the bank \$13,500, as the proceeds of the sale and transfer, and that it was the custom of the company to sell its notes to banks, was sufficient to show that the indorsement and transfer to the bank was made in the usual course of business. From these facts the necessary authority will be inferred, notwithstanding the absence of the corporate seal and the fact that evidence of the adoption of a formal resolution is wanting. Mr. Thompson, in his work on Corporations, volume 4, section 5741, says: "The presumption [of right acting] extends to dealings in negotiable securities other than to the act of issuing them. Under its operation, an assignment by a corporation of a note held by it is presumed to be valid until the contrary appears. Here again it is assumed that the corporation has a general power to assign such instruments, and the force of the presumption is that its officers exercised the power rightly in the particular instance, or in the ordinary course of its business." In the absence of any evidence to the contrary, the holder of the note under the indorsement made will be presumed to be the owner thereof. (Code Civ. Proc., sec. 1963, subds. 11, 15.) Indeed, the general rule appears to be that, in the absence of *mala fides*, which is not claimed here, plaintiff's *prima facie* title by reason of possession is not subject to rebuttal so long as he is protected from further claim by the payment of the judgment. (*Dyer v. Sebrell*, 135 Cal. 597, [67 Pac. 1036]; *Ellicott v. Martin*, 6 Md. 509, [61 Am. Dec. 327]; *Marbourg v. Lloyd*, 21 Kan. 545; *Mitchell v. Deeds*, 49 Ill. 416, [95 Am. Dec. 621]; *Hawkins v. Fourth Nat. Bank*, 150 Ind. 117, [49 N. E. 957].)

Appellants also contend that the evidence was insufficient to support the finding to the effect that the stock pledged as security for the payment of the note was transferred to the bank. No evidence was offered upon the subject; none was necessary. The indorsement and transfer of the note carried with it the collateral pledged as security for the payment thereof. (Civ. Code, sec. 1084; *Duncan v. Hawn*, 104 Cal. 10, [37 Pac. 626].) Plaintiff's right to the collaterals pledged was not dependent upon the actual delivery thereof.

His interest therein was by virtue of being the holder of the note, and if the payee of the note, after transferring the same, retained the collaterals, his holding was as trustee for the bank. "Where a note is secured by collaterals and the pledgee assigns the note, the fact that he does not deliver the collaterals to the assignee does not deprive the latter of his interest under or title to them, because the pledgee, after selling the note, holds the collaterals as agent or trustee for his assignee." (22 Am. & Eng. Ency. of Law, p. 879.) Conceding that the transfer of the note was not sufficient evidence of the transfer of the collateral, nevertheless, the finding, if unsupported by the evidence, is harmless.

The court refused to permit defendant Nofziger to offer evidence in support of a counterclaim filed with his answer, wherein it was alleged the note was given in settlement of a sum appearing to be due from him in a certain transaction had with the Consolidated Lumber Company, but, through mistake and inadvertence, the amount specified therein was \$2,700 in excess of the sum actually due. There was no prejudicial error in the ruling. Conceding the facts alleged in the pleading to be sufficient to constitute a counterclaim against the Consolidated Lumber Company, nevertheless defendant could not avail himself of such defense in this action as against plaintiff, for the reason that the note having been transferred to the bank before maturity for full value, it was necessary, in order to constitute a counterclaim against plaintiff, to allege additional facts showing that the bank took the note with notice of existing equities. It is not alleged that plaintiff or the bank had notice of the facts set up in the counterclaim, nor are any facts alleged therein showing want of good faith on the part of the bank in the purchase of the note. "The general rule is that absence of consideration or a failure of consideration is available as a defense in a suit by an assignee of the instrument only by specially pleading the same and showing by additional allegations why the instrument is subject in his hands to the defense, as, for instance, that the assignee is a holder with notice." (14 Ency. of Pl. & Pr., p. 641.) In the absence of an allegation that the bank had notice of the facts set up in the pleading at the time the note was transferred to it, a counterclaim based upon a partial failure of consideration constituted no defense

to the action, and hence no evidence was admissible in support thereof. (*Hancock and Mills v. Hale*, 17 Fla. 808; *Malsch v. Heller* (Tex. Civ. App.), 37 S. W. 384; *Gee v. Saunders*, 66 Tex. 333, [1 S. W. 272].)

After the evidence was closed the court, without notice to defendants, permitted plaintiff to amend his complaint to conform to the evidence introduced upon the trial, it being stipulated that the allegations of the amendment should be deemed denied. (Code Civ. Proc., secs. 469, 470.) There was no abuse of discretion on the part of the court in allowing the amendment. Upon the trial evidence had been offered as to the subject matter of the allegations contained therein. Under the circumstances, it would have been idle to have required notice thereof to defendants. (*Maionchi v. Nicholini*, 1 Cal. App. 690, [82 Pac. 1052]; *San Joaquin Valley Bank v. Dodge*, 125 Cal. 77, [57 Pac. 687].) Moreover, it clearly appears that in no event, conceding the alleged error, were the substantial rights of defendants prejudiced by the ruling.

The judgment is affirmed.

Allen, P. J., and Taggart, J., concurred.

[Crim. No. 158. Second Appellate District.—June 21, 1910.]

THE PEOPLE, Respondent, v. FRED LOOMER, Appellant.

CRIMINAL LAW—MURDER—IMPANELMENT OF JURY—EXHAUSTION OF JURORS IN DEPARTMENT PANEL—COMPLETION FROM CODEPARTMENT.—In the impanelment of a jury upon a criminal trial for murder, where the impanelment of the jury was incomplete and the panel was exhausted in the department of the superior court in which the trial was had, the panel may be completed from the trial jury panel summoned in another department of the same superior court.

LD.—SUPPORT OF VERDICT—CONFLICTING EVIDENCE.—Where the defendant relied upon self-defense, and the evidence was conflicting, and the testimony for the people tends to prove the guilt of the defendant, this court will not disturb a verdict finding the defendant guilty of murder in the second degree.

ID.—DEFORMITY OF DEFENDANT—PROOF AT TRIAL—PROPER REFUSAL OF MOTION TO EXHIBIT UNCLAD BODY TO JURY.—Where the deformity of the body of the defendant in having one limb shorter and smaller than the other was proved at the trial by his own testimony and by his physician's uncontradicted testimony, the court did not err in refusing his motion for leave to exhibit his unclad body to the jury for the purpose of exhibiting the deformity so proved. The substantial rights of the defendant were not prejudiced by such ruling.

ID.—REQUESTED INSTRUCTIONS SUBSTANTIALLY EMBODIED IN CHARGE.—The court did not err in refusing instructions requested by the defendant which, so far as correct, were substantially embodied in the instructions given, which, taken as a whole, are not only full and complete, but well calculated to protect and guard the defendant in securing a fair and impartial consideration at the hands of the jury.

ID.—PROPER INSTRUCTION AS TO THREATS OF DECEASED.—In view of the evidence, it is held that the court properly instructed the jury that "previous threats of the deceased toward the defendant, however violent they may have been, are not of themselves sufficient to justify the defendant in slaying the deceased; to excuse or justify him, he must have acted under an honest belief that it was necessary at the time of taking the life of the deceased, in order to save his own or himself from great bodily injury, and it must appear that there was reasonable cause to excite this apprehension on his part."

ID.—THREATS OF DECEASED AGAINST FATHER OF DEFENDANT—DUTY OF DEFENDANT TO REQUEST INSTRUCTIONS.—Where there was some evidence tending to show threats and acts of hostility against the father of the defendant, between whom and deceased there was a dispute about a crop of corn which deceased was cutting, as well as a dispute with defendant concerning the same crop, if defendant wished instructions given concerning his defense of his father, as well as of himself, it was his duty to request such instructions, if he deemed the evidence sufficient to warrant the same.

ID.—REQUEST AS TO JUSTIFIABLE HOMICIDE.—When the court, at defendant's request, gave an instruction as to justifiable homicide, in the language of section 197 of the Penal Code, and he did not ask further elaboration of that section, nor any additional instructions concerning defense of his father, his complaint that the court failed to so instruct cannot now be entertained upon appeal.

ID.—PROPER REQUEST AS TO DUTY OF EACH JUROR—REASONABLE DOUBT. A requested instruction that: "In criminal cases, the law requires the concurrence of twelve minds in the conclusion of guilt. Before a verdict of guilty can be legally rendered, each member of the jury must be satisfied beyond a reasonable doubt of the guilt of the defendant. Therefore, if any one of the jurors, after having considered all of the evidence, and having consulted with his fellow-jurors, should entertain a reasonable doubt of the guilt of the de-

defendant, as charged in the information, he should not, under his oath, consent to a verdict of guilty. Each juror should act upon his individual judgment upon the facts of the case, and he is in duty bound not to surrender his conviction if he entertains a reasonable doubt as to the guilt of the defendant, merely because the other jurors entertain no doubt as to his guilt"—was proper, and should have been given.

ID.—IMPROPER REFUSAL OF REQUEST—ABSENCE OF PREJUDICIAL ERROR—INSTRUCTIONS GIVEN—POLLING OF JURY.—The improper refusal of such request was not, under the circumstances of this case, an error which prejudiced the substantial rights of the defendant, and therefore, under the provisions of section 1258 of the Penal Code, it should be disregarded. Where the jury were fully instructed as to the law of "reasonable doubt," and as to the "presumption of innocence," and other instructions were given which were calculated to impress upon each juror the duty which devolved upon him, to be guided by the evidence and the instructions of the court, and each juror was polled when the verdict was rendered, it cannot be presumed that any member of the jury rendered his verdict in violation of his oath and the instructions of the court.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. George R. Davis, Judge.

The facts are stated in the opinion of the court.

Henry H. Roser, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

SHAW, J.—By information the defendant was charged with the crime of murder. Upon trial therefor he was convicted of murder in the second degree, and by judgment of the court sentenced to twenty years' imprisonment. He appeals from the judgment and an order denying his motion for a new trial.

The case was tried in department 12 of the superior court of Los Angeles county. It appears that after five men had been selected from the panel of jurors summoned to serve in this department and sworn to act as jurors in the trial of the case, the clerk then drew from the trial jury-box of department 12 four additional names of veniremen, which ex-

hausted the panel of jurors summoned to serve in said department. Thereupon the court made an order requiring the attendance in department 12 of the trial jury panel summoned for service in department 11 of the court, and from this panel the clerk proceeded to draw the names of three jurors, who, together with the four last drawn from the jury-box of department 12, were duly sworn to answer questions touching their qualifications as jurors in the case. This proceeding seems to have been in strict accord with the provisions of section 248, Code of Civil Procedure, which provides as to counties having two or more judges of the superior court that, "when a panel of jurors is in attendance for service before one or more of the judges, whether impaneled for common use or not, the whole or any number of jurors from such panel may be required to attend and serve in the trial of cases, or to complete a panel, or jury, before any other of the judges." The jury was incomplete, there being only nine men in the jury-box and the panel of department 12 was exhausted. Defendant was entitled to have the box full before exercising his peremptory challenges. Clearly, the action of the court was without error.

Appellant claims the evidence adduced at the trial was insufficient to justify the verdict of the jury, in that it shows that in self-defense defendant was justified in killing deceased. The circumstances surrounding the killing were as follows: Defendant and his father were tenants of certain lands adjoining which deceased was, as a tenant of the same owner, farming a tract of land. A controversy between the parties arose over their respective rights to a piece of land, the right to farm which was claimed by both defendant's father and deceased. The latter, it seems, had put in a crop of corn on the portion of the property involved in the dispute, and defendant's father claimed to be entitled to one-third of the crop as rental. This was denied by deceased. At the time of the killing of deceased he was engaged with a corn-knife or sickle cutting corn which stood in stalk, when defendant, accompanied by his father, went to the place where deceased was so engaged, and, according to defendant's evidence, an altercation ensued in which all three took part. Appellant's defense was based upon justifiable homicide, his contention being that deceased did or was about to attack

him and his father with the corn-knife with which he was engaged in work, and believing that both he and his father were in imminent danger of great bodily harm at the hands of the deceased from such attack, he, in self-defense, drew a revolver which he had upon his person and shot deceased, with the result that death ensued almost immediately thereafter. As usual in such cases, the evidence is conflicting. No good purpose could be subserved by repeating it here. Suffice it to say that the testimony adduced on the part of the people tends in some degree to prove the guilt of defendant. While the jury might properly have reached a different conclusion, nevertheless, under the circumstances here presented, it is not within the province of this court to disturb the verdict upon the ground that the evidence is insufficient to support it. (*People v. Fitzgerald*, 138 Cal. 39, [70 Pac. 1014].)

There was no error in the ruling of the court denying defendant's motion to exhibit his unclad body to the jury for the purpose of showing that he was physically deformed, in that one leg was considerably shorter than the other and the limb much smaller in circumference. So far as such facts were material, he had the benefit of his own and his physician's full and uncontradicted testimony touching the matter. At most, such an exhibition would have afforded merely cumulative evidence of facts concerning which there was no dispute. In no event were the substantial rights of defendant prejudiced by the ruling.

The defendant requested the court to give instructions covering upward of thirty pages of the transcript, nearly all of which were refused. Appellant insists that such refusal as to a number of the instructions constituted error. We have carefully examined each and every one of the alleged erroneous rulings, and, with two exceptions hereafter considered, find that appellant's contention in this regard merits no discussion other than to say that where such requested instructions correctly stated the law, we find them, in substance, embodied in the instructions given, which, taken as a whole, are not only full and complete, but well calculated to protect and guard the defendant in securing a fair and impartial consideration of his rights at the hands of the jury.

It is claimed the court erred in instructing the jury that, "Previous threats or acts of hostility of the deceased toward the defendant, however violent they may have been, are not of themselves sufficient to justify the defendant in slaying the deceased; to excuse him, or justify him, he must have acted under an honest belief that it was necessary at the time to take the life of the deceased, in order to save his own or himself from great bodily injury, and it must appear that there was reasonable cause to excite this apprehension on his part," as well as in the giving of other instructions predicated upon the hostile acts of deceased toward defendant without any reference being made therein to his father. His contention is that "the language of all these instructions should have been made to apply to the father as well, and that threats or menaces made by deceased against the father or defendant were of avail to defendant if, at the time of the killing, his parent was actually assailed, or defendant had sufficient evidence to convince a reasonable person, at that time, that his parent was in imminent danger of great bodily injury, or of losing his life." There was some evidence tending to prove threats and acts of hostility on the part of deceased toward the father of defendant, who accompanied him, and that in shooting deceased, defendant did so in defense of his father, whom he had reason to believe was about to be attacked by deceased. Conceding that under the evidence an instruction in effect as now suggested by appellant would have been proper, nevertheless, it was his duty to have requested it, if he deemed the evidence sufficient to warrant the same. The instruction above quoted as given was, under the evidence, a proper one. The court, at defendant's request, gave an instruction upon justifiable homicide in the language of section 197, Penal Code. Defendant did not ask further elaboration of the provision of said section, nor the additional instructions which he now suggests should have been given. It was his duty to request them, if he deemed them necessary or proper. Not having done so, his complaint that the court failed to so instruct cannot now be entertained. In the case of *People v. Matthai*, 135 Cal. 446, [67 Pac. 696], the court, in discussing a like question, says: "The court charged upon justifiable homicide in the language of the code. If the defendant desired an elaboration of the principles there

expressed, he should have proposed his instructions to that end." To the same effect is *People v. McLean*, 84 Cal. 482, [24 Pac. 32]; *People v. Weber*, 149 Cal. 346, [86 Pac. 671].

Defendant requested the court to give an instruction to the jury as follows: "In criminal cases, the law requires the concurrence of twelve minds in the conclusion of guilt. Before a verdict of guilty can be legally rendered, each member of the jury must be satisfied beyond a reasonable doubt of the guilt of the defendant. Therefore, if any one of the jurors, after having considered all of the evidence and having consulted with his fellow-jurors, should entertain a reasonable doubt of the guilt of the defendant, as charged in the information, he should not, under his oath, consent to a verdict of 'guilty.' Each juror should act upon his own individual judgment upon the facts of the case, and he is in duty bound not to surrender his own convictions, if he entertains a reasonable doubt as to the guilt of the defendant, merely because the other jurors entertain no doubt as to his guilt." With reference to a similar instruction, the supreme court, speaking through Chief Justice Beatty in the case of *People v. Dole*, 122 Cal. 495, [68 Am. St. Rep. 50, 55 Pac. 585], says: "This is a correct statement of the duty of a juror, and should have been given. If any juror needed an instruction upon this point, it was harmful to refuse it; if no juror needed the instruction, it would have been harmless to give it." In a concurring opinion in the case of *People v. Howard*, 143 Cal. 323, [76 Pac. 1118], the chief justice repeats the above-quoted language.

The instruction, for the reasons stated in the *Dole* case, was a proper one, and should have been given. Conceding, however, that the court erred in refusing to give it, we are, nevertheless, of the opinion that, under the circumstances of this case, the error was one which did not prejudice the substantial rights of defendant, and, therefore, under the provisions of section 1258, Penal Code, it should be disregarded. The jury were fully instructed as to what constituted a reasonable doubt, and that in case of a reasonable doubt as to defendant's guilt he was entitled to acquittal; "that the law raises the presumption of innocence, which attends the defendant throughout his trial, and which goes with the jury into the jury-room"; that it was the duty of the jury to

“consider the testimony in the light of that presumption of innocence, and that presumption must prevail to acquit the defendant, unless the state has by sufficient evidence established the guilt of the defendant to a moral certainty and beyond a reasonable doubt”; that it was the duty of the prosecution to prove beyond a reasonable doubt the truth of every material allegation in the information; that “nothing is to be presumed or taken by implication against the defendant”; that “the law presumes him to be innocent of the crime with which he is charged”; “that this case is to be determined from the evidence adduced at the trial, and from the instructions of the court, and no outside influence or statement of alleged facts, whether agreeing with the facts proved at the trial or not, is proper matter for the jury’s consideration, and any such must be entirely laid aside by you in your consideration of this case.” And again, “the burden of proof is upon the prosecutor; all the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty.” There were other instructions of like import, all calculated to impress upon each juror to whom instructions were addressed the duty which devolved upon him, that in reaching a verdict he should be guided by the evidence and instructions of the court. In addition to this, it appears that the jury, upon bringing in its verdict, was polled, and each individual juror asked if the verdict rendered was his verdict, to which each member of the jury responded in the affirmative. Section 604, Code of Civil Procedure, provides that, “an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ———, the plaintiff, and ———, defendant, and a true verdict render according to the evidence.” We cannot assume that any member of the jury rendered his verdict in violation of such oath and the instructions of the court. As said by Justice Shaw in his concurring opinion in *People v. Perry*, 144 Cal. 756, [78 Pac. 287]: “An exception which involves nothing more important than the failure of the court to protect the defendant against the very remote contingency that some juror may so misunderstand or disregard his oath and the other instructions, or the equally remote contingency that such a juror would be prevented from

so doing by an instruction such as that here involved, does not, in my opinion, affect the substantial rights of the defendant."

We find no prejudicial error in the record, and the judgment and order are, therefore, affirmed.

Allen, P. J., and Taggart, J., concurred

[Civ. No. 817. Second Appellate District.—June 22, 1910.]

EMMA L. SHEER, Respondent, v. F. J. HOYT and A. M. HOYT, Appellants.

CORPORATIONS—CONTRACT TO PURCHASE STOCK—FALSE REPRESENTATIONS AS TO INVENTION—RESCISSION—SUFFICIENT COMPLAINT.—A complaint in an action to rescind a contract to purchase stock in a corporation, organized to manufacture patented mining machinery, and procure a return of real property conveyed in part payment, which alleges a contract between plaintiff and defendant F. J. Hoyt to purchase the stock for \$5,000, and to accept a conveyance made by plaintiff to his wife, A. M. Hoyt, at his request, in part payment of \$3,000, and to give her note to F. J. Hoyt for the residue, and that to induce such purchase and conveyance, F. J. Hoyt represented to plaintiff that the patented machine, which was practically the sole asset of the corporation, would economically abstract the finest particles of flour gold, and was a perfected machine, which representations induced the purchase, and that they were false and untrue, and that plaintiff relied wholly thereupon, states a cause of action.

ID.—MISREPRESENTATIONS OF FACT.—The allegation that misrepresentations were made as to the character of the assets of the corporation and the mechanical fitness and productive capacity of the machine, which constitutes the sole means of income, must be regarded as alleging more than a mere opinion as to the value of an invention or the market value of the stock of the corporation. The representations made were not statements of what the machine in question might be expected to do, but of things which it had done and was capable of doing.

ID.—MATTERS OF OPINION STATED AS FACTS.—Matters which might otherwise be only expressions of opinion, when stated as accomplished facts by one of the parties to a contract, and accepted and relied upon by the other as such, may, and often do, become the basis of actions for fraudulent misrepresentations.

ID.—CONVEYANCE OF LAND TO DEFENDANT'S WIFE—FALSE REPRESENTATIONS OF HUSBAND—WIFE NOT PROTECTED AS VENDEE.—The conveyance of the land by plaintiff to defendant's wife, under the circumstances appearing, does not entitle her to the rights of a *bona fide* purchaser, or justify her in retaining property obtained from plaintiff by the fraudulent representations of her husband. She was bound by her husband's acts and representations in making the sale of the stock. She was not a purchaser from her husband as vendee, and the court found, upon sufficient evidence, that she held the title in trust for her husband as vendee of the land, accepted in part payment of the stock purchased of him by plaintiff.

ID.—ADMISSIONS OF ANSWER—CONSIDERATION FROM WIFE NOT AVERRED. The answer admits that the conveyance was made to defendant's wife by virtue of the transactions connected with the sale of the stock, and pursuant to the agreement to convey the property to the husband in part payment for the stock, and it nowhere appears in the pleadings that there was any consideration moving from her for such conveyance.

ID.—FINDINGS FOR PLAINTIFF SUPPORTED BY EVIDENCE.—*Held*, that the findings for the plaintiff as to the falsity of the representations made by the seller of the stock, and that plaintiff relied thereupon in making the purchase thereof, are sufficiently supported by the evidence.

ID.—IMPROPER EVIDENCE—THEORETICAL PERFECTION OF MACHINE.—When a witness called for defendants had testified, in his direct examination, that the machine was defective in certain respects, the court did not prejudicially err in sustaining an objection to a question whether or not, considering the principle on which the machine was constructed, he considered the machine a perfect one when he first saw it. The answer called for covered no issue. The representation was that it was a perfected machine, as a matter of practical demonstration, and not that it was theoretically perfect, although mechanically a failure.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Chas. Monroe, Judge.

The facts are stated in the opinion of the court.

Campbell & Moore, for Appellants.

Cryer & Tuttle, for Respondent.

TAGGART, J.—Action to rescind contract to purchase stock in corporation organized to manufacture mining ma-

chinery and operate same on a royalty; also to procure return of real property conveyed in part payment. Defendants, by way of counterclaim, seek to recover balance of purchase price of stock evidenced by writing in form of a promissory note, payable on demand after such stock shall reach a salable value of fifty cents per share. Judgment was for plaintiff and defendants appeal from the judgment and an order denying their motion for a new trial.

The trial court found, in accordance with the allegations of the complaint, that plaintiff made a contract with the defendant F. J. Hoyt to purchase twenty thousand shares of the stock of the Hoyt Mining Machinery Company for \$5,000; that she conveyed the lot of land mentioned above to A. M. Hoyt, wife of said F. J. Hoyt, which conveyance was accepted as the first payment on said stock, and gave her note for \$3,000, in the form above stated, to F. J. Hoyt for the deferred payment. The court also found the deed was so made to A. M. Hoyt at the direction and for the benefit of F. J. Hoyt; that to induce plaintiff to purchase said stock and to make such conveyance F. J. Hoyt represented to her that the "Hoyt Ball Amalgamator" (which was practically the sole asset of the corporation whose stock she was buying) was a machine that would effectually and economically abstract and collect from gold-bearing dirt and gravel the finest particles of gold, to wit, flour gold; that said machine had passed the experimental stage and was a perfected machine; that nothing remained to be done by said corporation but to manufacture and market its machines; that these representations were the material inducements which led plaintiff to purchase the said stock; that they were false and untrue; that she relied and acted upon them, and had no knowledge herself of mining machinery. It is contended in support of this appeal that these findings are unsupported by the evidence, and that the complaint fails to state a cause of action.

The complaint is sufficient against the attacks made upon it. An allegation which states that misrepresentations were made as to the character of the assets of a corporation, and the mechanical fitness and productive capacity of the machine which constitutes its sole means of income, must be regarded as alleging something more than a mere opinion as to the value of an invention, or the market value of the stock of the

corporation. The representations made were not statements of what the machine in question might be expected to do, but of things which it had done and was capable of doing. Matters which might otherwise be only expressions of opinion, when stated as accomplished facts by one of the parties to a contract and accepted and relied upon by the other as such, may, and often do, become the basis of actions for fraudulent misrepresentations. (*Johnson v. Withers*, 9 Cal. App. 52, [98 Pac. 42]; *Pomeroy's Equity Jurisprudence*, 3d ed., sec. 878, p. 1562.)

The conveyance of the title to the real property to Mrs. Hoyt does not entitle her to any of the rights of a *bona fide* purchaser for value, or justify her in retaining the property obtained from plaintiff, if it were obtained by means of the fraudulent misrepresentations found by the court to have been made by her husband. The finding of the court that this conveyance was made for the benefit of F. J. Hoyt has support in the circumstances of the case and the evidence in the record. If the court had found the statement of F. J. Hoyt, when on the stand, "I think I used Mrs. Hoyt's stock in making this transaction; that was how it happened to be made to Mrs. Hoyt," to be true, and accepted this as showing that the stock which was sold belonged to Mrs. Hoyt, it must also have reached the conclusion that she was bound by her husband's acts and representations made in effecting the sale. Authorities considering the rights of purchasers in good faith from vendees obtaining title to real property by fraudulent representations have no application here. Mrs. Hoyt is not a purchaser from the vendee. She is either the vendee or holds title for the benefit of the vendee. The court found her to be the latter, and there is evidence to sustain that finding. The answer admits that the conveyance was made to her by virtue of the transactions connected with the sale of the stock, and pursuant to the agreement of plaintiff to convey the property to F. J. Hoyt, and, other than in the above-quoted statement, it nowhere appears that there was any consideration moving from her for such conveyance. This issue as here made was not specially presented at the trial, the parties apparently resting principally upon the pleadings in this respect.

The finding that the representations of F. J. Hoyt were untrue is sustained by the testimony of the witness Higby. This witness testified, not only that the machine was not as represented, but that Hoyt himself had admitted this to be the case. He also testified, without objection, to an effort of Hoyt to induce him to join in furthering other sales based upon an improved machine. In speaking of the improved machine Hoyt said: "This is a good-looking machine. It has got lots of wheels and lots of screws. It will sell, won't it?" As an inducement to the witness to join in this venture, Hoyt said to him, "We want to make some money, don't we?" If the new and improved machine was open to the comment made by Hoyt, it might well be inferred that the unimproved one failed to justify the statements made by him to plaintiff in regard to it. This manner of speaking of the improved machine and the conversation of Hoyt in this connection gave color to all of the projects to sell stock based upon the value of his inventions.

Appellant's other assignment of insufficiency of the evidence to support a finding of the court, to wit, that plaintiff was induced to enter into the contract by the representations of Hoyt, is equally unsupported by the record. The evidence abundantly shows that the moving inducement to plaintiff was that defendant was the inventor and the corporation the owner of a perfected machine, which it had been demonstrated would successfully take out the fine flour gold from the dirt and the gravel, and that this machine had advanced beyond the experimental stage. These statements were untrue, and plaintiff had neither knowledge, experience, nor independent advice by which to determine their truth or falsity when she purchased the stock. That she saw the machine in Los Angeles is in no way inconsistent with this, and does not show, as appellants contend, that she was fully acquainted with the condition of the company and its affairs at the time she bought. The financial condition of the corporation was not the inducement presented to her when solicited to purchase the stock. It was the ability of the machine, which the corporation owned, to do certain work that gave the value to the shares of stock purchased, and as to this she relied upon Hoyt's representations.

We see no prejudicial error in the court's sustaining the objection of plaintiff to the question propounded by defendants to the witness Deck. This witness, who was called on behalf of defendants, had testified in his direct examination that the machine was defective in certain respects. Notwithstanding this, defendants asked him whether or not, considering the principle on which the machine was constructed, he considered the machine a perfect one when he first saw it. The court sustained an objection to this question, which is assigned as error. The representation to the plaintiff was that it was a perfected machine as a matter of practical demonstration, and not that it was theoretically perfect, although mechanically a failure. The answer called for covered no issue in the case, and the ruling of the court was correct.

No prejudicial error appearing in the record, the judgment and order are affirmed.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 687. Third Appellate District.—June 23, 1910.]

EMIL A. EIDINGER, Appellant, v. JOSEPH A. SIGWART,
Executor of the Will of AUGUST EIDINGER, De-
ceased, Respondent.

ORDER GRANTING NEW TRIAL—GROUNDS OF MOTION—GENERAL ORDER—
REVIEW UPON APPEAL.—Where the notice of motion for a new trial specified as the grounds of the motion insufficiency of the evidence to justify the verdict, that the verdict is against law, and errors of law occurring at the trial and excepted to by the defendant, and the order granting the new trial was general, if the court could reasonably, in the exercise of a sound discretion, have granted the motion on any one of the grounds assigned, the order granting the new trial will not be disturbed upon appeal.

Id.—SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE.—Though specifications of insufficiency of the evidence should preferably be in the negative form, yet the substance of the specifications is to be considered rather than the form; and it is sufficient that it is readily ascertainable from the specification wherein the moving party claims that the evidence is insufficient to justify the verdict; and

this is all that should be required in a bill of exceptions or statement on motion for a new trial, where the insufficiency of the evidence to justify the verdict is one of the grounds of the motion.

ID.—COMPLAINT UPON QUANTUM MERUIT—PROOF OF EXPRESS CONTRACT—NONSUIT DENIED—EXCESSIVE RECOVERY.—Where the complaint was based upon a *quantum meruit*, and the proof disclosed that the services were based solely upon an express contract, and not only was a nonsuit denied for the variance, but the verdict was at the rate of five dollars a day on the implied contract, while the express contract was limited to three dollars per day, the court might properly grant a new trial for insufficiency of the evidence to justify the verdict.

ID.—RECOVERY LIMITED TO CAUSE OF ACTION PLEADED.—The plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed in the proof.

ID.—VARIANCE CLEARLY SHOWN.—That there was a variance between the implied contract declared upon and the express contract proved, there is no ground for possible doubt.

ID.—QUESTION AS TO NONSUIT UNDETERMINED.—Whether, in view of the fact that there was evidence in the record from which the conclusion might reasonably follow that the alleged services were reasonably worth the sum of three dollars per day, the variance might be held to be fatal or of such vital importance as to have entitled the defendant to a favorable ruling on the motion for a nonsuit, need not be determined.

ID.—FACT OF VARIANCE TO BE CONSIDERED WITH OTHER TESTIMONY—GROUND FOR NEW TRIAL.—The fact of the variance, however, whether sufficient to have warranted the granting of the motion for nonsuit or not, when considered with other testimony, possesses some importance in determining whether the court abused its discretion in its order granting a new trial upon the ground of insufficiency of the evidence to justify the verdict, and presumably from the record that was one of the grounds, if not the principal ground, upon which the new trial was granted.

ID.—QUESTIONS REFLECTING UPON RIGHT OF RECOVERY.—In connection with other questions reflecting upon plaintiff's right of recovery, it is further asked, if plaintiff was employed under an express contract, why did he present a claim to the executor based on an implied contract for greater compensation than that agreed upon and plead the latter in his action against the estate? It is held that all of the questions suggested would naturally present themselves to the trial judge in the consideration and decision of the motion for a new trial.

ID.—EVIDENCE JUSTIFYING NEW TRIAL.—It is held that, in any event, the evidence appearing in the record is such that this court cannot say that the trial court abused its discretion in granting a new trial.

ID.—DISCRETION OF TRIAL COURT AS TO NEW TRIAL ORDER—INSUFFICIENCY OF EVIDENCE—CONFLICT.—The granting or denial of a new trial on the ground of insufficiency of the evidence to justify the order, where there is a substantial conflict in the evidence, rests so largely in the discretion of the trial court that its action is conclusive upon the appellant, unless it appears that there has been an abuse of discretion.

ID.—DUTY OF TRIAL COURT.—When the evidence is conflicting, the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of the evidence, it is its duty to grant a new trial.

APPEAL from an order of the Superior Court of El Dorado County granting a new trial. N. D. Arnot, Judge.

The facts are stated in the opinion of the court.

William F. Bray, Francis J. Heney, and Charles W. Cobb,
for Appellant.

Abe Darlington, for Respondent.

HART, J.—This is an appeal from the order granting the defendant a new trial.

The action was for the recovery of compensation for alleged personal services rendered by the plaintiff for the defendant's intestate during the lifetime of the latter.

The complaint alleges, and the evidence shows, that the deceased, in the month of December, 1905, was stricken with paralysis, and that he continued to suffer from that malady until the date of his death, on the twenty-ninth day of July, 1908. It is averred that the plaintiff, "at the special instance and request of the deceased," performed "work, labor and services in nursing, tending and waiting upon" deceased from the time he was taken ill until his death; "that said labor, work and services so performed in nursing, tending and waiting upon said August Eidinger were and are reasonably worth the sum of five dollars per day for each and every day thereof; and that seven hundred and thirty days of said labor, work and services were performed and rendered to the said August Eidinger within two years next preceding the commencement of this action."

Plaintiff presented his claim in due form to the executor of the will of the deceased, and the same was by said executor rejected and disallowed. The cause was tried by a jury and verdict returned in favor of the plaintiff in the sum of \$1,825.

Immediately after the return and recordation of the verdict, and on the same day, judgment was entered in favor of plaintiff for the amount awarded by the jury.

Within due time, the defendant moved for a new trial on the grounds that the evidence was insufficient to justify the verdict, that said verdict is against law, and "errors in law occurring at the trial and excepted to by said defendant."

As stated, the court granted this motion.

From the evidence, it appears that the deceased, who was a widower and without a family, resided at Placerville, in El Dorado county, where he owned several pieces of real estate. Plaintiff was a nephew of the deceased, and the testimony shows that a couple of years prior to the time the deceased was stricken with paralysis, the plaintiff's mother, Mrs. Wilhelmina Eidinger, also a sister in law of deceased, and her daughter, came to his home and took up their residence with him; that Mrs. Eidinger "kept the house" for the deceased from that time until his death; that the deceased, a few months before he was stricken with paralysis, gave to Mrs. Wilhelmina Eidinger real estate and personal property of the aggregate value, approximately, of \$5,000. Mrs. Eidinger testified that she and her daughter, Augusta, went to the house of the deceased in the year 1903 for the purpose of "keeping house" for him; that the deceased said that he would give his property "to whoever would come up and take care of him, and he carried out this proposition by giving me the deed." (By his will the deceased also gave to her one-fourth of all the estate of which he was seised at the time of his death.) Mrs. Eidinger further testified that she and her daughter and the wife of the plaintiff "helped to take care of deceased and were very faithful; . . . that their efforts were all combined to care for the deceased."

Upon the question of the employment of plaintiff by the deceased, Mrs. Eidinger testified that her daughter, at the request of the deceased, "wrote to plaintiff offering him \$2.50 per day to come up and take care of him; that plaintiff replied that he could not come right away; that deceased then

dictated another letter to him, offering him three dollars per day, and plaintiff replied that he would come right away, and he did come on December 10, 1905; that the other nurse, Mr. Hirsch, stayed only four days after the arrival of plaintiff."

The plaintiff testified that the deceased, during his lifetime, paid him (plaintiff) the sum of three dollars, which amount constituted all that he had received on his claim for services rendered the deceased. On cross-examination, he admitted that he expected, "when I found out I was not going to get any pay," that he would be provided for or compensated for his services in the will of deceased, but that, having been entirely overlooked by the deceased in his will, he therefore presented his claim against the estate.

There was some other testimony introduced by plaintiff showing that he performed certain services as a nurse for deceased. By cross-examination of some of plaintiff's witnesses, it was established that the deceased, during the several years of his illness, maintained and supported plaintiff and his wife, as well as his mother, Wilhelmina Eidinger, and his sister, Miss Augusta Eidinger. It was also shown through the testimony of Mrs. Minnie Eidinger, wife of plaintiff, that the bills paid by the deceased for the maintenance of his household, during the period of his sickness, amounted to something over \$3,000, said money having been received by him during that period from time to time from various sources of income available to him.

For the defense, the witness, Maginness, who was then engaged in the business of buying and selling grain, testified that the plaintiff worked for him "off and on for about a year during 1907 and 1908 at unloading cars, and that he unloaded from one to three cars a week, taking two and a half or three hours to unload a car. Sometimes he got a car a week and sometimes two or three; in the fall he had as high as three in one week, generally about one or two; the average being about one car a week with occasionally an increase."

Joseph A. Sigwart, executor of the will of the deceased, testified that he had known the deceased for thirty-five years, and that his acquaintance with him was intimate; that plaintiff never had talked to him about his claim, nor asked him

(witness) about it; but that he did hear plaintiff say, after the death of the testator, that "he had something coming to him," but that plaintiff never came to the office of the witness to talk about or discuss any claim he might have against the estate. Sigwart testified that the deceased "was very punctual in the matter of paying his bills," and, without objection, further testified that, some six or eight months before he died, he asked deceased if he had money with which to pay his bills, to which deceased replied, "Yes, I got money." Witness then asked deceased if he had "paid everything"; he answered, "I pay everything as I go along."

The foregoing, which represents a fair synopsis of the testimony received at the trial, is a sufficient statement of the evidence for the purposes of the consideration and disposition of the questions involved in this appeal.

It will be observed that the plaintiff pleads and relies upon a *quantum meruit*. At the close of his case, the defendant moved for a nonsuit on the ground that there was a variance between the allegations of the complaint and the proof, in that, while the former, as stated, disclosed an implied contract, the latter established an express contract. This motion was denied. It does not appear from the record whether the trial court granted the motion for a new trial on one only of the several grounds set out in the notice of motion or upon all of them.

But where there is stated in the notice any one ground of several upon which the court could reasonably, in the exercise of a sound discretion, grant a new trial, the order will not be disturbed.

It is, however, preliminarily objected that "the specifications of insufficiency of the evidence in the bill of exceptions in this case are wholly improper and insufficient in form, and precluded the lower court from examining the evidence." There are but three specifications of the kind referred to, and they are not in the negative form, which is always to be preferred, but state that the plaintiff "has introduced evidence to prove," etc., and "that the testimony of the plaintiff himself shows," etc., and that the evidence "shows that August Eidinger contributed," etc.

The objection is addressed to form rather than substance. It is readily ascertainable from the specifications wherein the

moving party claims that the evidence is insufficient to justify the verdict, and this is all that should be required in this respect in a bill of exceptions or statement on motion for a new trial, where the insufficiency of the evidence to justify the verdict is one of the grounds of the motion. The opposing counsel could certainly have experienced no difficulty in determining what additional evidence, if there is any in the record upon the points to which the specifications refer, should be inserted in the statement. Speaking on this subject, the supreme court, in the case of *American Type etc. Co. v. Packer*, 130 Cal. 461, [62 Pac. 744], says: "If the specification is sufficient to enable the opposing counsel to determine what evidence should be put in the statement, and the judge to strike out redundant and useless matter, it is enough. The statute in this matter is not primarily for this court, but for the trial court. That court should not hear the motion unless the statement contains such specifications. Upon that subject, the trial judge, who tried the case, has a decided advantage over this court in determining whether the specifications are sufficient." It is further declared in that opinion that such a specification "is in the nature of a notice, the sufficiency of which should be tested by inquiring whether the opposite party is injured by defects. It is not even regarded with the strictness with which an error of the court must be. If error at all, it is committed by a party and in a manner in which great liberality should be exercised by courts. Whenever there is a reasonably successful effort to state 'the particulars,' and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds, and the trial court has entertained and passed upon the motion, in my opinion this court ought not to refuse to consider the case on appeal."

In disposing of an objection similar to the one here, and referring to a number of cases cited by counsel in support of said objection, and particularly to the case of *De Molera v. Martin*, 120 Cal. 548, [52 Pac. 825], the supreme court, in *Drathman v. Cohen*, 139 Cal. 313, [73 Pac. 182], has this to say: "If the decision in that case were followed, perhaps the specifications here in question would be declared insufficient; but experience has proven that the rule there laid

down was too strict, and that it has been productive of evil and not good. Perhaps some of the other cases cited may also tend to establish the same rule. But latterly the court has been more liberal in such matters, and the rule now followed is stated in *American etc. Co. v. Packer*, 130 Cal. 459, [62 Pac. 744].'' (See, also, on this question, *Stuart v. Lord*, 138 Cal. 672, [72 Pac. 142]; *Holmes v. Hoppe*, 140 Cal. 212, [73 Pac. 1002]; *Bell v. Staacke*, 141 Cal. 186, [74 Pac. 774]; *Jones v. Goldtree Bros. Co.*, 142 Cal. 383, [77 Pac. 939]; *Southern Pacific Co. v. Lipman*, 148 Cal. 480, [83 Pac. 445].)

It is but the statement of an elementary proposition to say that the plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proof. (*Mondran v. Goux*, 51 Cal. 151; *Evans v. Bailey*, 66 Cal. 112, [4 Pac. 1089]; *Reed v. Norton*, 99 Cal. 617, [34 Pac. 333]; *Shenandoah etc. Co. v. Morgan*, 106 Cal. 409, [39 Pac. 802]; *Elmore v. Elmore*, 114 Cal. 516, [46 Pac. 458]; *Davis v. Pac. Tel. etc. Co.*, 127 Cal. 312, [57 Pac. 764, 59 Pac. 698]; *Schirmer v. Drexler*, 134 Cal. 134, [66 Pac. 180].) That there is a clear technical variance between the contract declared upon and the one proved, there is no ground for possible doubt. The complaint, as seen, declares upon an implied contract or a *quantum meruit*. The only testimony in the record showing, or tending to show, a contract was that given by the plaintiff's mother, Mrs. Wilhelmina Eidinger, and her testimony shows that the deceased dictated a letter to plaintiff, agreeing to pay him at the rate of three dollars per day for his services as a nurse to wait upon and care for the deceased, and that plaintiff replied that "he would come right away"; that plaintiff did, on December 10, 1905, go to the home of deceased and remained with and served him as a nurse until his death. It is thus to be observed that, if there was any contract at all, it was an express contract. The terms were fixed and definite. Deceased offered plaintiff a certain wage if he would "come up and take care of him"—that is, take care of him *during his illness*.

But whether, in view of the fact that there is *some* testimony in the record from which the conclusion may reasonably follow that the alleged services of plaintiff were reasonably worth the sum of three dollars per day, this variance might

be held to be fatal, or of such vital and material importance as to have entitled the defendant to a favorable ruling on his motion for a nonsuit, is a matter which it is not necessary to decide here. The fact of the variance, however, whether sufficient to have warranted the granting of the motion for a nonsuit or not, when considered with certain other testimony, possesses some importance in the determination of the question whether the court below abused its discretion in its order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict, and, presumably, judging from the record before us, that was one of the grounds, if not the principal one, upon which the order was made.

That the trial court was justified in granting a new trial on said ground, we think appears reasonably clear even from the record here.

The plaintiff declared upon a *quantum meruit*. If the proof disclosed any contract at all, it was, as seen, an express contract. The plaintiff himself testified that he expected to be provided for in the will of the deceased—that is, giving his testimony a construction the most favorable to him, he expected his compensation to be attended to by the deceased in his will, but the matter having been thus neglected by the deceased, he presented his claim against the estate. The testimony shows that deceased was very punctual in the payment of his debts and the extinguishment of his obligations; that he had ample means at his command during his illness to pay all bills incurred in the maintenance of his household affairs; that he paid plaintiff the sum of three dollars only during the whole period of plaintiff's engagement with him; that plaintiff occasionally worked at other employment for another party; that deceased asked Mrs. Wilhelmina Eidinger, mother of plaintiff, to come to his home and "keep house" for and take care of him, and that "he would give his property to whoever would come up and take care of him," and that "he carried out this proposition by giving witness the deed," and, in addition, some personal property, and, besides, giving her by will one-fourth of the residue of his estate. This testimony, excluding from consideration the testimony of Sigwart, which, although going in without objection, might be regarded as incompetent because involving self-serving declarations, to the effect that deceased, just before his death, said to him

that he had paid all his bills—that he paid “everything as I go along”—is sufficient to inspire distrust in the justness of plaintiff’s claim or grave doubt whether the plaintiff was in reality ever employed for any purpose by deceased. Why did not deceased pay plaintiff more than the sum of three dollars during the long period of his alleged service to deceased? Why did plaintiff occasionally work for another party during that period? Why, if he had an understanding with deceased that he was to render services as a nurse, did plaintiff expect that the payment of his compensation would be postponed until after the death of deceased and said compensation arranged for in the will of deceased? If deceased employed plaintiff to take care of him, why did he also employ plaintiff’s mother to do like service, and promise to give her in return all his property, and why did he give her the bulk of it? If plaintiff was employed under an express contract as to compensation, why did he present a claim to the executor based upon an implied contract for greater compensation than that agreed upon, and then plead the latter in his action against the estate? These are questions which would naturally suggest themselves, and which no doubt occurred to and influenced the mind of the trial judge in the consideration and decision of the motion for a new trial. In any event, the evidence, as it appears before us, is such that we cannot say that the trial court abused its discretion in granting the order for a new trial.

“The granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence,” says the supreme court, in *Domico v. Casassa*, 101 Cal. 413, [35 Pac. 1024], “rests so fully in the discretion of the trial court, that its action is conclusive upon this court, unless it appears that there has been an abuse of discretion.”

In *Warner v. Thomas etc. Works*, 105 Cal. 411, [38 Pac. 960], it is likewise held that it is settled law in California that a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court, with whose decision thereon interference is unwarranted, unless there clearly appears an abuse of such discretion. And it is further declared in that opinion that, “when the evidence is conflicting, the trial court

is authorized to review it, and if, in its opinion, the verdict is against the weight of evidence, it is its duty to grant a new trial." (See, also, *Bjorman v. Fort Bragg R. R. Co.*, 92 Cal. 500, [28 Pac. 591]; *Coler v. Wilcox*, 99 Cal. 549, [34 Pac. 114]; *Bledsoe v. De Crow*, 132 Cal. 312, [64 Pac. 397].)

The order is affirmed.

Burnett, J., and Chipman, P. J., concurred.

[Crim. No. 237. First Appellate District.—June 23, 1910.]

THE PEOPLE, Respondent, v. VICTOR HECK, Appellant.

CRIMINAL LAW—FAILURE OF APPELLANT TO FILE BRIEF—REVIEW UPON APPEAL—Where the appellant from a judgment of conviction of the crime of passing a fictitious check, and from the order denying his motion for a new trial, has failed to file any brief within the time limited therefor, or within an extension of time agreed to upon suggestion of the attorney general, and the case is submitted for the decision of this court, the appellate court does not feel called upon to search the record for error which possibly might justify a reversal of either the judgment or the order, and they will be affirmed.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. Everett J. Brown, Judge.

The facts are stated in the opinion of the court.

James J. Von Hovenberg, for Appellant.

U. S. Webb, Attorney General, for Respondent.

THE COURT.—The defendant was charged with the crime of passing a fictitious check. Upon the trial he was convicted, and this is his appeal from the judgment of conviction and from the order denying his motion for a new trial.

The case was upon the calendar for oral argument May 9, 1910, at which time no one appeared for the defendant, but upon the suggestion of the attorney general that it had been

agreed between the attorney general and the counsel for the defendant that the defendant might have fifteen days in which to file a brief, such time was given. He did not file any brief within the time allowed, nor has any extension of time been asked or granted. The case was therefore submitted for the decision of this court.

As we have not been apprised, either by an oral argument or by any brief, of the grounds upon which appellant claims that either the judgment or order should be reversed, we do not feel called upon to search the record for error which possibly might justify a reversal of either the judgment or the order.

The judgment and order are therefore affirmed.

[Crim. No. 244. First Appellate District.—June 27, 1910.]

THE PEOPLE, Respondent, v. W. F. GORDON, Appellant.

CRIMINAL LAW—UTTERING FICTITIOUS INSTRUMENT—PRIOR OFFENSE—ACTION TO SET ASIDE INFORMATION—ADMISSION OF NAME—RECORD UPON APPEAL—PRESUMPTION.—Where a defendant accused of uttering and passing a fictitious instrument for the payment of money to the order of W. F. Gordon, and indorsed by defendant in that name, which defendant admitted to be his true name, and also accused of a prior conviction for embezzlement under the same name, moved to set aside the information on the ground that he had not been legally committed for the prior offense, because he was committed therefor under the name of "William F. Gordon," if there were otherwise any merit in the motion, yet as there is no evidence in the record as to such commitment or its contents, or as to the name under which defendant was committed, it must be presumed that the district attorney performed his duty, and that such charge was founded upon the commitment by the magistrate.

ID.—ABSENCE OF PREJUDICE—WITHDRAWAL OF PRIOR CONVICTION.—No prejudicial error could result from denying the motion to set aside the information for illegal commitment under the prior conviction, where, before sentence, the district attorney withdrew the charge of prior conviction.

ID.—SUFFICIENCY OF INFORMATION—NONEXISTENCE OF FICTITIOUS MAKER "THEN OR THERE."—An information charging that on a specified date, "at the city and county of San Francisco," the de-

defendant feloniously uttered and passed a fictitious instrument in writing fully set forth, and bearing the signature of "H. C. Watson," and stating: "Whereas in truth and in fact there was no such individual as H. C. Watson then or there in existence," was sufficient to enable the defendant or any person of common understanding to know what was intended, and sets forth the acts charged with such degree of certainty as to enable the court to pronounce judgment upon conviction. The word "then" is very comprehensive, and if there was no such person "then" in existence, there was certainly no such person "there," at the city and county of San Francisco.

ID.—EXAMINATION OF PROSPECTIVE JURORS BY DISTRICT ATTORNEY—CROSS-EXAMINATION.—It is held that no error was committed by the district attorney in the examination of prospective jurors, and that nothing in such examination pointed toward any prior offense of defendant and that any suspicion of reference to such prior offense was wholly due to cross-examination of a juror made by the defendant.

ID.—EVIDENCE—ADMISSION OF FICTITIOUS DRAFT—PLACING IN BANK FOR COLLECTION UNNECESSARY—USELESS ACT.—The admission in evidence of the false and fictitious draft, without showing that it had been placed in bank for collection, was not error. It was unnecessary to do the vain and useless thing of placing a false and fictitious draft in a bank, which would not have been paid, and must have been returned by the bank.

ID.—EXHIBIT FOR COMPARISON OF HANDWRITING—GUILTY KNOWLEDGE OF DEFENDANT.—The admission in evidence of the exhibit of a letter for the purpose of comparison of the handwriting of one W. C. Watson, who had been introduced to the witness, who was engaged in selling encyclopedias, by the defendant as a purchaser, and who signed a written order therefor in the presence of the defendant, who received a commission for such purchase, the letter stating that said Watson declined to receive the encyclopedia, was proper for the purpose specified, and as tending to show guilty knowledge on the part of defendant.

ID.—REQUESTED INSTRUCTION AS TO NONEXISTENCE OF MAKER OF DRAFT—PROOF BEYOND REASONABLE DOUBT—PROPER REFUSAL.—A requested instruction that "the nonexistence of the individual H. C. Watson mentioned in the information . . . is one of the material issues involved in the case," and that "the nonexistence of said H. C. Watson must be proved beyond and to the exclusion of all reasonable doubt and to a moral certainty, and if there be any reasonable doubt as to whether or not there was in existence anywhere in the world such individual" on the date specified, "you must resolve that doubt in favor of the defendant, and find a verdict of not guilty," was properly refused.

ID.—DEGREE OF PROOF REQUIRED.—The prosecution was not required to prove, nor were the jury bound to believe beyond a reasonable doubt, that there was no such person in the world as H. C. Watson at the time the writing was signed. It was only necessary to show to a common certainty that there was no such person in existence in the vicinity of, and connected with, the particular acts charged in the place and county where jurisdiction accrued.

ID.—MISTAKE IN INITIALS OF NAME IN INSTRUCTION.—An evident mistake in the initials of the name of W. C. Watson, with whom defendant was connected in the encyclopedia transaction, in referring to the same by the court in an instruction as "H. C. Watson," which is made evident by what follows in the instruction, which would lead the jury to believe such reference, will not be considered as intended, or that the court was charging them, as matter of fact, that the writer of the draft was the same W. C. Watson referred to as giving the order for the encyclopedia.

ID.—INSTRUCTIONS CORRECT AS A WHOLE—MISTAKE IN INITIAL NOT GROUND FOR REVERSAL.—Where the instructions, as a whole, fairly and fully instructed the jury as to the questions of law bearing upon the issues before them, the court will not, for imaginary errors, or errors in regard to getting one initial wrong in an instruction, or in some other part of the record, reverse a case that appears to have been fairly tried.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. M. T. Dooling, Judge Presiding.

The facts are stated in the opinion of the court.

Burton Jackson Wyman, for Appellant.

U. S. Webb, Attorney General, for Respondent.

COOPER, P. J.—The defendant was found guilty of uttering and passing a fictitious instrument in writing for the payment of money, and sentenced to a term of three years in the state prison. He prosecutes this appeal from the judgment and the order denying his motion for a new trial.

The information states that the defendant is accused of feloniously uttering and passing, on the twentieth day of May, 1909, at the city and county of San Francisco, a fictitious instrument in writing for the payment of money, with intent to defraud one Aaron Jacobs, which fictitious instrument in

writing is stated to have been "then and there in the words and figures following, to wit:

" "San Francisco, Cal., May 20th, 1909.

" "\$25.00 At sight pay to the order of W. F. Gordon twenty-five no/100 dollars Value received, and charge the same to account of H. C. Watson.

" "To Geo. W. Harrington, No. 212 Fifth street, San Diego, Cal. H. C. WATSON.

" "No protest. Tear this off before presenting."

"Indorsed as follows: 'W. F. Gordon.' "

The information further charges a prior conviction of a felony, to wit, embezzlement, by a judgment of the superior court given and made on or about the thirty-first day of December, 1900.

Defendant made a motion to set aside the information upon the grounds that prior to the filing thereof the defendant had not been legally committed by a magistrate for the prior offense charged in the information, and that he was committed under the name of William F. Gordon, while the information charges him under the name of W. F. Gordon.

His first contention is that the court erred in denying his motion. If there were otherwise any merit in the motion, it is sufficient to say that counsel has failed to call our attention to any evidence in the record as to the commitment made by the magistrate or its contents, or even the name under which the defendant was committed by the magistrate, and upon inspection we have failed to find any such evidence. We must therefore presume in favor of the record that the district attorney performed his duty. That the information is founded upon the commitment as made by the magistrate. Not only is this so as matter of law, but we find by the record that when the information was read to the defendant, he admitted his true name to be W. F. Gordon, and before sentence the district attorney withdrew the charge of a prior conviction.

The information is said to be so fatal that the demurrer to it should have been sustained. The argument is made that after the first charging part of the information, and after setting forth a copy of the instrument, it states that "whereas in truth and in fact there was no such individual as H. C. Watson then or there in existence," and it is contended that the words "then or there" are indefinite, and may have dif-

ferent meanings. The criticism is highly hypercritical. The information charges in the portion preceding the quoted clause that the instrument was false and fictitious. The statement that there was no such person "then" in existence is very comprehensive, and certainly if there was no such person in existence on the twentieth day of May, 1909, there was no such person "there" in the city and county of San Francisco. The information was sufficient to enable the defendant or any person of common understanding to know what was intended, and it sets forth the acts charged with such degree of certainty as to enable the court to pronounce judgment upon conviction.

There was no error committed by the court in allowing the district attorney to ask of prospective jurors the questions pointed out in appellant's brief as to the jurors being personally acquainted with certain persons therein named. The juror Lemmon was asked by the district attorney if he knew one Mr. Tompkins, who used to be the warden at San Quentin, and also if he knew a man named Dan Sullivan, who was in some way connected with the county clerk's office. The juror replied that he did not know either of them. The juror Blanchfield, in answer to a question by the district attorney, said he knew Dan Sullivan. The principal complaint is made as to the examination of the juror Rulfs. In answer to a question by the district attorney in direct examination, Rulfs testified that he did not know Dan Sullivan, but that he did know one A. Jacobs. In cross-examination of the juror by defendant's counsel, it was shown that the juror had read some account of the matter in the newspapers; that he remembered "about a prisoner over there getting acquainted with the warden's wife, something like that; that is all I remember about it." This is said by defendant's counsel to have reference to the fact that the defendant had before been in San Quentin for a prior offense. It is sufficient to say that we cannot determine from the record what prisoner the juror referred to. We cannot presume that the reference was to this defendant; and even if the answer raised a suspicion that the prisoner referred to was the defendant, the matter was elicited in answer to questions asked by defendant's own counsel in cross-examination. There was no motion to strike

out, and the juror further stated that he was not in any way prejudiced by what he had read.

The admission of the written instrument in evidence without showing that it had been placed in a bank for collection was not error, nor was it necessary to have the draft sent through a bank for collection. If the draft was false and fictitious as alleged in the information, it would not have been paid, and would have been returned by the bank. Hence it was not necessary to do a vain and useless thing.

It is stated that the court committed error of the most prejudicial character in admitting in evidence over defendant's objection a document marked "People's Exhibit B." It appears that the exhibit was a letter, and was offered and admitted in evidence merely for the purpose of the "physical appearance of the paper and the handwriting," and evidently for the purpose of comparison. Prior to the time the letter was offered one Riggs had been called as a witness for the prosecution, and testified that about April 10th of 1909, the defendant came to his place of business with a man claiming to be W. C. Watson, whom defendant introduced to the witness as W. C. Watson; that the person purporting to be W. C. Watson signed a written order to the witness for an encyclopedia that the witness appears to have been agent for, and that the order was signed in the presence of the witness "W. C. Watson, 103 Natoma street." The witness Riggs was further examined, and identified a paper marked "People's Exhibit A" (which appears to be the instrument described in the information). The witness testified that he received the letter "Exhibit B" by mail on the twelfth day of April, 1909; that it had been in his possession ever since. The letter "Exhibit B" was a request to Riggs not to deliver the encyclopedia, as the writer of the letter would not receive it, and was signed "W. C. Watson." The witness further testified that he compared the signature of the letter with the signature on the written order that he saw signed in the defendant's presence by the man purporting to be W. C. Watson, and that they appeared to be the same. Now, the only object of admitting the letter in evidence on the testimony of Riggs was for the purpose of the physical appearance of the letter and the handwriting for comparison. The court did not err in admitting it for the purposes named. The

facts preceding it, to wit, that the defendant had gone with the party W. C. Watson to the place of business of Riggs and introduced him to Riggs, and that an order was then signed by said party, W. C. Watson, for an encyclopedia, on which defendant received a commission from Riggs; that the said Watson never took or paid for the encyclopedia, tend at least in some degree to show guilty knowledge on the part of defendant. The witness Riggs having seen the purported Watson sign his name to the order for the encyclopedia, and having received in due course of mail a letter countermanding the order so signed "W. C. Watson," stated that he had compared the signature to the letter with the signature to the order, and that they appeared very much alike. The code provides (Code Civ. Proc., sec. 1943): "The handwriting of a person may be proved by anyone who believes it to be his and who has seen him write or has seen writings purporting to be his on which he has acted or been charged, and who has thus acquired a knowledge of his handwriting." The witness Riggs had seen the man who claimed to be W. C. Watson write, and had acted upon the writing so made by the man purporting to be said W. C. Watson, and the effect of his testimony is that he believed the letter to be in the same handwriting. While the evidence was not as convincing as in many cases, we cannot say, as matter of law, that it was not sufficient to prove to the satisfaction of the trial judge that the letter was written by the same man who wrote the order for the encyclopedia.

It is claimed that the court erred in refusing the defendant's requested instruction as follows: "The nonexistence of the individual H. C. Watson mentioned in the information, like all the other essential elements which go to make the offense for which this defendant is being tried, is one of the material issues involved in the case. The nonexistence of the said H. C. Watson must be proved by the prosecution beyond and to the exclusion of all reasonable doubt, and to a moral certainty, and if there be any reasonable doubt in your minds as to whether or not there was in existence anywhere in the world such an individual as H. C. Watson on the twentieth day of May, 1909, you must resolve that doubt in favor of the defendant, and find a verdict of not guilty."

The instruction was properly refused. The prosecution certainly was not required to prove, nor were the jury required to believe, beyond a reasonable doubt, that there was no such person in the world as H. C. Watson at the time the writing was signed.

It was only necessary to show to a common certainty that there was no such person in existence in the vicinity of, and connected with, the particular acts charged in the place and county where jurisdiction accrued. (*People v. Eppinger*, 105 Cal. 36, [38 Pac. 538]; *People v. Terrill*, 133 Cal. 120, [65 Pac. 303].) If the proposition contended for in the instruction be the law, it would be impossible in any case to prove beyond a reasonable doubt that there was no such particular person in the world.

The instruction of the court as to evidence covering another transaction between defendant and H. C. Watson and the witness Riggs was evidently an inadvertence as to the use of the initials "H. C." instead of "W. C." This is plain from what follows, wherein the jury are told that that was offered as "tending to show a connection between the defendant and said H. C. Watson, whom the people claim to be the maker of the draft in question." The jury evidently understood that the court referred to the transaction where the order for the encyclopedia was signed by the man purporting to be "W. C. Watson." We do not think the court intended to lead the jury to believe, nor could the jury have believed from the language used by the court, that the court was charging them, as a matter of fact, that the writer of the draft was the same W. C. Watson referred to by Riggs as giving the order for the encyclopedia.

We have examined the instructions as a whole, and we think that they fairly and fully instructed the jury as to the questions of law bearing upon the issues before them. It is not for imaginary errors, or errors in regard to getting one initial wrong in an instruction, or in some other part of the record, that the court will reverse a case that appears to have been fairly tried; and in regard to other errors which are claimed to have occurred in rulings on testimony, we have examined them, and we do not find any of sufficient importance to justify a reversal of the case.

The judgment and order are affirmed.

Kerrigan, J., and Hall, J., concurred.

[Crim. No. 252. First Appellate District.—June 28, 1910.]

THE PEOPLE, Respondent, v. ERNEST BOERO, Appellant.

CRIMINAL LAW—RAPE—SEXUAL INTERCOURSE WITH YOUNG GIRL—SUPPORT OF VERDICT.—*Held*, that, in this prosecution for rape committed by the defendant in having sexual intercourse with a young girl under the age of sixteen years, it was for the jury to determine as to the truth of the testimony for the prosecution, in the first instance, and where the judge of the trial court, who also heard and saw the witnesses, has approved of the verdict for conviction, this court cannot say, as matter of law, that the verdict is not supported by the evidence.

ID.—EVIDENCE—PREVIOUS ACTS OF INTERCOURSE.—Upon the trial of such prosecution, the court properly admitted evidence of other acts of sexual intercourse between the defendant and the prosecutrix, occurring before the act relied upon for a conviction.

ID.—GENERAL RULE AS TO OTHER ACTS.—In prosecutions for adultery, incest and rape (especially when committed by consent upon persons under the age of consent), other acts of sexual intercourse between the same persons may be proven as showing an adulterous disposition, and thus corroborating the evidence of the substantive charge.

ID.—CONFLICT IN AUTHORITIES AS TO TIME OF OTHER ACTS.—There is some conflict in the authorities as to the right to give evidence of acts of sexual intercourse occurring after the act upon which the indictment is based, but acts occurring prior thereto are well within the rule allowing such evidence.

ID.—CASE QUALIFIED.—The case of *People v. Ah Lean*, 7 Cal. App. 628, is qualified on the subject of the admissibility of prior acts of sexual intercourse.

ID.—DEFECTIVE RECORD AS TO TIME OF IMPRISONMENT—AMENDMENT UPON NOTICE AND HEARING.—The objection that the judgment in the record is defective in not showing the time of imprisonment has been removed upon suggestion of diminution of the record which shows that after notice and hearing the word "years" has been inserted after the figure "20" by amendment of the judgment.

ID.—FAILURE OF JUDGMENT-ROLL TO SHOW PRESENCE OF DEFENDANT—ERROR NOT PRESUMED.—The mere failure of the judgment-roll to show that defendant was present during the trial on a specified afternoon is immaterial where it does not show that he was not present. All intendments are in favor of the judgment; and error will not be presumed, but must be affirmatively shown by the appellant.

ID.—DEFENSE OF ALIBI—CONFLICT OF EVIDENCE—VERDICT CONCLUSIVE.—

Where the evidence as to the *alibi* relied upon by the defendant simply raised a conflict with the testimony for the prosecution, the verdict of the jury against the defendant is conclusive upon this court.

ID.—AUTHENTICATION OF REPORTER'S TRANSCRIPT OF EVIDENCE.—The reporter's transcript of the evidence should be sworn to by him, as required by section 1247 of the Penal Code; and before it is transmitted to this court it must be authenticated by the trial judge, as required by section 1247A of the Penal Code.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a new trial. William S. Wells, Judge.

The facts are stated in the opinion of the court.

D. C. Dutton, for Appellant.

U. S. Webb, Attorney General, for Respondent.

HALL, J.—Defendant was convicted of the crime of rape for having had sexual intercourse with a girl under sixteen years of age, and appealed from the judgment and order denying his motion for a new trial.

It is first urged that the evidence was insufficient to justify the verdict. It is not claimed that the girl did not give evidence that fully supported the charge, but it is claimed apparently that the evidence was in itself unreasonable, because it appears that the act was committed in the presence and with the approval of the wife of the defendant.

But in addition to the evidence of the girl, the testimony of the landlady of the house was to the effect that she found the girl in the room of defendant and his wife, on the occasion in question, after defendant and his wife had gone to bed. Medical testimony was also given tending to show that the girl had had sexual relations with someone near to the time of the alleged offense. It was for the jury to determine as to the truth of the testimony in the first instance. The judge of the trial court, who also heard and saw the witnesses, has approved the verdict. We cannot say that, as a matter of law, the verdict is not supported by the evidence. (*People v. Moore*, 155 Cal. 237, [100 Pac. 688].)

The court did not err in permitting evidence of other acts of intercourse between defendant and the prosecutrix, occurring before the act relied upon for a conviction. In prosecutions for adultery, incest and rape (especially when committed by consent upon persons under the age of consent) other acts of sexual intercourse between the same persons may be proven as showing an adulterous disposition, and thus corroborating the evidence of the substantive charge. (*People v. Stratton*, 141 Cal. 604, [75 Pac. 166]; *People v. Koller*, 142 Cal. 621, [76 Pac. 500]; *People v. Castro*, 133 Cal. 12, [65 Pac. 13]; *Lefforge v. State*, 129 Ind. 551, [29 N. E. 34]; *State v. Markins*, 95 Ind. 464, [48 Am. Rep. 733]; *State v. Bridgman*, 49 Vt. 202, [24 Am. Rep. 124]; *Thayer v. Thayer*, 101 Mass. 111, [100 Am. Dec. 110]; *People v. Cease*, 80 Mich. 576, [45 N. W. 585]; *Proper v. State*, 85 Wis. 615, [55 N. W. 1035]; *People v. O'Sullivan*, 104 N. Y. 481, [58 Am. Rep. 530, 10 N. E. 880]; *State v. Parish*, 104 N. C. 679, [10 S. E. 457]; *Ramey v. State*, 127 Ind. 243, [26 N. E. 818]; *People v. Hilberg*, 22 Utah, 27, [61 Pac. 215].)

There is some conflict in the authorities as to the right to give evidence of acts of sexual intercourse occurring after the act upon which the indictment is based; but in this case the evidence objected to related to acts occurring before the act selected as the offense, and was well within the rule allowing evidence of this character.

The language upon this subject, found in *People v. Ah Lean*, 7 Cal. App. 628, [95 Pac. 380], was evidently inadvertently used, as no authorities were cited upon the question to this court.

The objection that the judgment in the record does not show whether the imprisonment is for twenty years, months or days has been removed upon suggestion of a diminution of the record. The original entry by the clerk omitted the word "years" after the figure "20." After due notice and hearing the entry was corrected to read "20 years." (*People v. O'Brien*, 4 Cal. App. 723, [89 Pac. 438].)

It is also contended that the judgment-roll does not show that defendant was present during the trial on the afternoon of February 17, 1910. It does not show that he was not present, and all intendments are in support of the judgment. In other words, the appellant must show error; it will not be pre-

sumed. (*People v. Douglas*, 100 Cal. 4, [34 Pac. 490]; *People v. Russell*, 156 Cal. 450, [105 Pac. 416]; *People v. Holmes*, 118 Cal. 444, [50 Pac. 675].)

The evidence as to the alibi relied on by defendant simply raises a conflict with the evidence for the prosecution. In such a case the verdict of the jury is conclusive on this court.

This disposes of all the points presented by appellant, and we have considered them as though the entire record was properly before us. The reporter's transcript, however, is not indorsed or authenticated by the trial judge as required by section 1247A of the Penal Code. Not only should the reporter's transcript be sworn to by him, as required by section 1247, Penal Code, but before it is transmitted to this court it should be authenticated by the trial judge in accordance with section 1247A, Penal Code.

The judgment and order are affirmed.

Cooper, P. J., and Kerrigan, J., concurred.

[Civ. No. 703. Third Appellate District.—June 29, 1910.]

NORTHWESTERN REDWOOD COMPANY, a Corporation.
Appellant, v. J. D. DICKEN, Respondent.

APPEAL FROM NEW TRIAL ORDER—"STATEMENT OF CASE"—"BILL OF EXCEPTIONS"—SPECIFICATIONS—REVIEW.—Where the notice of motion for a new trial specified that it would be made upon a "statement of the case," and the trial judge designated it in his settlement as a "bill of exceptions," it may be treated either as a statement or a bill of exceptions, and it is sufficient that, in either case, the specifications of the errors occurring at the trial and excepted to, for which a reversal of the order denying the new trial is asked, are sufficiently pointed out to have enabled the trial court properly to consider them, and to enable this court to review them without difficulty or inconvenience.

ACTION FOR GOODS SOLD—CREDITS OF LUMBER—SALE OF LUMBER BUSINESS — OPTION — EXECUTORY CONTRACT — PAROL EVIDENCE — INADMISSIBLE HEARSAY.—In an action for a balance of goods sold for supplies to defendant as a lumber manufacturer, whose lumber was delivered to plaintiff and credited on the account, in which it appears that subsequently defendant, in consideration of ten dollars paid by

one Roach, and further payments to be made by him, signed a unilateral contract to sell to him all of his timber and mill business, whether such contract was an option as testified by Roach, or an executory contract of sale as claimed by defendant, and conceding that the contract was so ambiguous as to justify parol evidence to explain it, yet it was prejudicially erroneous to admit hearsay declarations of Roach made after the execution of the contract, and not made in the presence of either party, that he had bought the timber and mill property and was the owner thereof.

ID.—SUPPOSITION OF EXECUTORY CONTRACT—OPERATION OF MILL.—If the transaction amounted to an executory contract of sale of the mill and timber on defendant's land, with the right to operate the mill pending final sale, Roach alone would be responsible for all supplies received while he operated the mill, and would be entitled to all credits for lumber delivered by him to plaintiff during such operation.

ID.—SUPPOSITION OF OPTION—AGENCY FOR OWNER.—If the transaction was an option on the part of defendant to sell to Roach, and the latter assumed control and management of the property for defendant, then, in the absence of any other agreement to the contrary, defendant continued to be responsible for all supplies furnished to the mill, necessary for its operation, and was entitled to credits of all timber delivered to plaintiff by Roach during the period in which he operated the mill as agent for defendant.

ID.—DECLARATIONS BY ONE NOT A PARTY ADMISSIBLE ONLY FOR IMPEACHMENT.—Declarations made by Roach, who was not a party to the action, and not made in the presence of either party, after the consummation of the transaction, that he had bought the mill and lumber business, constituted the plainest kind of hearsay testimony, and could prove admissible under no conceivable theory, except, after proper foundation laid, for the purpose of impeaching Roach as a witness. Proof of such declarations could not constitute affirmative or independent evidence contradictory to the testimony of Roach.

ID.—DECLARATIONS NOT PART OF RES GESTAE.—The declarations were not admissible as part of the *res gestae*, after the execution of the contract, whether it be regarded as an option upon consideration conferring a right, or an executory contract of purchase and sale. The fact that a final transfer of the property had not taken place when the declarations were made would not extend the agreement to sell and buy, so as to make the declarations admissible as part of the *res gestae*.

ID.—GENERAL RULE AS TO RES GESTAE.—Where the intention of the parties to a written contract is rendered obscure by the ambiguity of the language in which its terms are expressed, evidence of the declarations of the parties to the contract, or either of them, made

contemporaneously with the negotiation and executions of the agreement, if explanatory of the purpose and intent of the same, would be admissible as part of the transaction, or *res gestae*.

ID.—NARRATIVE OF PAST EVENT NOT BINDING—HEARSAY.—Declarations made by one of the parties to the contract, not made in the presence of either of the parties to the action, but made after the transaction evidenced by the contract had been fully completed, are a mere narrative of a past event, and would constitute mere hearsay testimony, which would be inadmissible in an action between other parties; and by no known rule of law are declarations thus made binding upon a stranger to the transaction.

ID.—NARRATIVE DECLARATIONS NOT ADMISSIBLE UNDER CODE PROVISIONS.—Such narrative declarations of one not a party to the action are not admissible, as "*prima facie* evidence," within section 1851 of the Code of Civil Procedure, or as "part of an act, declaration, conversation or writing which had been given in evidence," within section 1854 thereof, nor as a declaration "against interest," within the purview of any section of that code.

ID.—INSTRUMENT PRIMA FACIE A MERE OPTION—PREJUDICIAL CHARACTER OF DECLARATIONS BEYOND DOUBT.—The instrument which is the main subject of this controversy, is held to appear from its language to be nothing more than a mere option, involving only the bestowal of the right to accept or reject within a certain time the offer therein contained to buy the property mentioned at the price named, and that it could not appear otherwise without parol evidence. The court recognized this necessity to overcome the legal effect of the transaction as shown by the writing; and was, beyond doubt, prejudicially influenced to a great extent by the improperly admitted declarations made by the holder of the option, not a party to the action, after the transaction was consummated, in construing its language as an executory contract of sale, instead of an option.

ID.—IMPROPERLY ADMITTED EVIDENCE PREJUDICIAL.—Even if some of the language in the instrument would lend color to the construction given by the trial court, the improperly admitted evidence of such declarations must nevertheless be held prejudicial. If improper evidence has been admitted, it is sufficient to require a reversal that it may have turned the scale and lost the case to appellants. This must of necessity be the rule wherever evidence has been admitted which tends in any degree to affect the final conclusion of the court.

APPEAL from an order of the Superior Court of Mendocino County denying a new trial. J. Q. White, Judge.

The facts are stated in the opinion of the court.

J. E. Pemberton, and Thomas & Thomas, for Appellant.

Robert Duncan, for Respondent.

HART, J.—This is an action by the plaintiff to recover from defendant the sum of \$664.79, alleged to be a balance due on an account.

The case was tried by the court, without a jury, and the defendant given judgment.

A new trial was denied to the plaintiff, and this appeal is from the order disallowing the motion therefor.

Respondent makes a preliminary objection to the consideration of the record here, claiming that the record of the proceedings contained in the transcript is neither a statement of the case nor a bill of exceptions. The notice of motion for a new trial states that said motion "will be made upon affidavits and upon a statement of the case," and counsel for respondent declares that, inasmuch as the document intended as a statement or a bill of exceptions is thereafter at all times referred to by counsel for the appellant and the judge in his certificate as a "bill of exceptions," we must accept such characterization of the document as conclusive of its character, and treat it as a bill of exceptions and not a statement. But it is further insisted that, even if it may be said to be a statement, it must be disregarded, since it does not contain, as required by section 659 of the Code of Civil Procedure, specifications of the particular errors occurring at the trial and excepted to by the appellant referred to in the notice of motion.

While the record of the proceedings in the court below as set forth in the transcript was settled by the judge as a "bill of exceptions," we think that it may be treated as either a statement or a bill of exceptions, and that in either case the principal, if not, in fact, the only, errors of law occurring at the trial and excepted to for which a reversal of the order is asked, are sufficiently pointed out in the "specification of errors" to have enabled the trial court to properly consider them, and to enable this court to review them without difficulty or inconvenience. These errors are thus specified in the statement or bill: "1. The court erred in each and every time in which evidence was admitted over plaintiff's objections of statements made by L. J. Roach not in the presence or

hearing of plaintiff or any of its officials or agents, to the admission of which evidence plaintiff duly excepted.”

Then follows a general or an omnibus specification assigning as error all the other rulings of the court against the objections of appellant. The first specification, however, was, as stated, sufficiently direct and definite to indicate the errors upon which appellant relied for a new trial, and demands a reversal of the order denying it, and we shall therefore proceed to review the record as to the errors thus pointed out.

The plaintiff is a corporation, organized in pursuance of the laws of this state, and engaged, among other things, in the general merchandising business, at Willits, in Mendocino county. The defendant had, for a number of years prior to July 6, 1907, prosecuted the business of cutting and manufacturing lumber on a body of timber land, consisting of eighteen hundred acres, situated on Cave creek, in said county. During all said time the plaintiff furnished defendant with supplies necessary for his domestic use, and for the purposes of his lumber-mills, and the latter, it seems, was accustomed to shipping and delivering to plaintiff, from time to time, or as it was manufactured, the lumber from his mill. The plaintiff would, upon the receipt of the lumber, credit the defendant upon its books for the lumber so delivered and received at the current market prices.

On the sixth day of July, 1907, the defendant, having previously entered into negotiations with one L. J. Roach, for the sale of his lumber-mill and the timber growing on the land mentioned, executed the following agreement with said Roach, said agreement being, upon its face, as will be observed, unilateral:

“Willits, Cal., July 6, 1907.

“For and in consideration of the sum of Ten Dollars, receipt whereof is hereby acknowledged, I hereby agree to sell to L. J. Roach all my timber on 1800 acres, more or less, situated on Cave Creek in Mendocino County, for Seventy-five cents per M ft. as determined by a disinterested competent timber cruiser, or Two Thousand Dollars cash, at option of Roach, and to allow said Roach Fifteen years from date of final consummation of sale to remove said timber, said Roach to be allowed mill sites and all necessary rights of way on any portion said lands for twenty years from date of sale, same

to be incorporated in formal instrument of transfer to be drawn by parties hereto. I also agree to sell to L. J. Roach all my mill property and appurtenances of every description, including saw mill, machinery, logging tools, skid-ways, four horses, ten oxen, harnesses, yokes, four wagons, two trucks, rigging, cooking utensils, etc., all for \$4,400 to be incorporated in inventory to be taken by parties hereto. I agree to furnish complete abstract of title to said land and to allow 30 days from date of delivery to said Roach to examine same, and to allow ten days from acceptance by said Roach to complete sale after all necessary legal requirements shall have been complied with.

“Said Roach to take immediate possession of said premises and conduct operations for me until final sale or rejection of title.

“J. D. DICKEN.”

The sum of ten dollars was paid to Dicken by Roach upon the execution of said instrument.

On the seventh day of July, 1907, in pursuance of the foregoing agreement, said Roach took possession and control of the mill and lumber manufacturing business referred to therein. The plaintiff continued to furnish supplies to the mill, but charged the same on its books to the defendant, and Roach delivered to the plaintiff, as defendant had always done, the lumber manufactured at the mill. The lumber so delivered was credited by plaintiff on the account of defendant.

Roach operated the business for a little over a month, when he abandoned it.

It may here be stated that “it was stipulated and agreed by the parties in open court that the account sued on and an itemized bill for which was then on file among the papers in the case was correct, so far as the particular items thereof were concerned; that the goods to the amount of \$800 had been sold and delivered to someone at the ‘Dicken Mill’ mentioned in the evidence; but it was not admitted that defendant was liable therefor.”

It was further admitted that “the controversy was in part whether said goods were sold to defendant through one L. J. Roach, as his agent, or to said L. J. Roach on his own account.”

The claim of the defendant against the complaint is that he agreed to sell, and Roach agreed to buy, the mill and the timber on his land on the sixth day of July, 1907, and that the instrument above quoted was intended as evidence of a contract of sale. The plaintiff and Roach insist that the quoted instrument was intended as evidencing an option only, and that Roach took possession of the property, not as a purchaser, but to manage the same for Dicken until he (Roach) should determine whether he would buy the property or not.

It appears that the written instrument or agreement on the part of Dicken quoted above had been altered in a material respect either before or after the time at which it was signed by Dicken. The document was prepared by one E. A. Selfridge, Jr., president of plaintiff corporation. As so prepared originally the last sentence of the writing read as follows: "Said Roach to take immediate possession of said premises and conduct operations *from date* until final sale or rejection of title." Selfridge and Roach testified that, when Dicken was about to sign the instrument, Roach objected to the words "from date" contained in said last sentence, saying to Selfridge, in the presence of Dicken, that "he would not go out there with the possibility of the option being rejected, the sale not going through." Selfridge then said, "Very well; we will change 'from date' and say 'for me.' " The alteration thus suggested was then made, and, according to the testimony of Selfridge and Roach, with the consent of both Dicken and Roach, and as so altered the agreement or writing was signed by Dicken.

Dicken flatly contradicted Selfridge and Roach on this point, and emphatically declared that the alteration was made after he had signed the instrument and without his knowledge and consent.

The court found with and in favor of Dicken as to the alteration, and held the transaction resulting in the writing to have constituted a contract for the sale of the property to Roach.

It appears from testimony offered and received on behalf of plaintiff that at the time of the alleged sale of the property to Roach, Dicken was indebted to plaintiff for supplies in a large sum of money, and that Roach, while running the mill, delivered lumber to plaintiff of much greater value than the

supplies and cash furnished Roach by plaintiff during the period of time he was operating the business. As stated, the lumber delivered to plaintiff by Roach was credited to the account of Dicken, so that the excess in the value of the lumber delivered by Roach over the supplies and cash received by him from plaintiff obviously contributed materially toward the reduction of the latter's account against Dicken. As seen, according to the complaint, the sum to which plaintiff's claim against Dicken was thus and otherwise reduced amounted to \$664.79, to recover which this action was instituted.

From what has thus far been seen of this controversy, as it is presented by the pleadings and the evidence, the vital point hinges upon the legal nature and effect of the transaction between Dicken and Roach as evidenced by the writing executed by Dicken on July 6, 1907, and quoted in this opinion.

If the transaction amounted to the making of an executory contract of sale of the mill and the timber on defendant's land, then, manifestly, Roach was alone responsible for all obligations incurred while he operated the mill, and was entitled to all credits for lumber delivered by him to plaintiff during the same period or term. If, on the other hand, the transaction involved only an option on the part of Dicken to sell to Roach, and the latter assumed control and management of the property for Dicken, then, it is equally manifest that, in the absence of any other agreement to the contrary, Dicken continued to be responsible for all supplies furnished the mill necessary in the operation thereof, and was entitled to all credits for all lumber delivered to plaintiff by Roach during the period the latter operated the mill. In this latter case, in other words, Roach was only an agent of Dicken.

A correct construction of the transaction between Dicken and Roach is, therefore, of vital importance.

To aid it in the construction of said transaction, the trial court, over the objections of plaintiff, admitted evidence of the declarations of Roach, made to the witnesses testifying thereto, after Dicken had executed the writing and Roach had taken charge of the property, and not in the presence of either plaintiff or defendant, to the effect that he (Roach) had bought from Dicken, and was the owner of, the lumber-mill and the business connected therewith.

The rulings of the court admitting this testimony constitute the principal subject of discussion in the briefs as well as the main reason for which appellant urges that the order should be reversed.

The rulings referred to were, in our opinion, not only erroneous, but, in view of the purpose of the evidence admitted thereunder, were highly prejudicial to the plaintiff.

Roach is not a party to this action, and his declarations after the consummation of the transaction, not in the presence of the plaintiff, that he had bought the mill and lumber business from Dicken, constituted the plainest sort of hearsay testimony, and could have been admissible under no conceivable theory except, after proper foundation had been laid therefor, for the purpose of impeaching Roach.

These declarations were not properly receivable in evidence under the rule of *res gestae*, and obviously not admissible on the ground that they constituted declarations against the interest of the declarant. Nor would proof of such declarations constitute proper substantive or independent and affirmative evidence contradictory to the testimony of Roach. Undoubtedly, where the intention of the parties to a written contract is rendered obscure by the ambiguity of the language in which its terms are expressed, evidence of declarations of the parties to said contract, or either of them, made contemporaneously with the negotiation and execution of the agreement, if explanatory of the purpose or intent of the same, would be admissible as part of the transaction or *res gestae*. But it is very clear that such declarations made by either of the parties, not in the presence of the parties to the action, after the transaction has been fully completed, in an action between one of the parties to the transaction and a third party, would involve a narrative of a past event, and, therefore, constitute hearsay testimony pure and simple. By no known rule of law are declarations thus made binding upon a stranger to the transaction.

But counsel for respondent advances the theory that, at the time the alleged declarations were made, "the transaction was not completed, and would not have been completed until the final transfer of title by Dicken to Roach." In this counsel is mistaken. The question to be determined by the court as to the transaction between Dicken and Roach was: What

were the legal relations established between them by the instrument whose terms were sought to be explained in part by the declarations of Roach after the execution of said instrument? Whatever was intended to be accomplished by the transaction evidenced by the writing—whether an agreement to sell and buy the property involved or only an option to buy the same—was completed by the execution by Dicken of said writing. The point at issue as to this transaction was whether an executory contract of sale had thus been effected or only an offer to sell tendered to Roach. Dicken claimed that it was an executory contract of sale. Roach contended that it was only intended as an offer or an option, and, as stated, the question was as to the legal effect of that transaction, which was, whatever may have been its ultimate purpose and scope, as fully completed as a transaction resulting in the actual sale of property could be. In other words, a contract involving an option to buy property is as fully a completed contract, to the extent of the only purpose intended to be accomplished thereby, as is a contract of sale or a contract for any other purpose. The gist of a contract of option is the *right* given thereby to accept or reject an offer to sell within a stipulated or reasonable time. If, therefore, as Roach testified, the transaction evidenced by the writing amounted to an option only, then it was completed as such upon the execution of the instrument by Dicken. If, on the other hand, it was intended as, and in fact constituted, an executory agreement to sell, as the trial court found the transaction to be, then the transaction itself was completed, even though there was something remaining to be done to fully consummate the effect of said transaction. In other words, accepting the defendant's construction of the transaction, the execution or completion of the *agreement* on his part *to sell* and on Roach's part *to buy* the property was a completion of that transaction, and the fact that a formal transfer of the property had not taken place at the time the declarations were made by Roach would not extend the "transaction" culminating in the *agreement to sell and buy* so as to make said declarations admissible under the rule of *res gestae*.

The case of *Lewis v. Burns*, 106 Cal. 381, [39 Pac. 778], cited by respondent, was where the declarations of one De Blainville, deceased at the time of the trial, were allowed in

evidence for the purpose of showing the character of a transaction by which certain real property was conveyed by the declarant to the wife of the plaintiff. De Blainville, by whom the plaintiff and his wife were employed, retained their wages, and, during the period of said employment, acted as their friend and adviser, and also acted for them in the investment of their earnings. The deeds to the property so bought by De Blainville for plaintiff and his wife were, by the advice of De Blainville, taken in the wife's name. The plaintiff was then a man of dissipated habits, and it was perhaps on this account that De Blainville suggested that the deeds be taken in the name of his wife. However, the wife, before her death, conveyed the property to her brother and sister, reserving to herself during life the rents, issues and profits thereof. Upon her death, her husband brought an action to quiet title to said property, and the question submitted for trial was whether the property was a gift from De Blainville to the wife, "or whether in purchasing said property De Blainville acted as the agent of the plaintiff and his wife and as their adviser," and the property so purchased constituted community property because of having been purchased with community funds. The supreme court held that "the declarations of De Blainville as to his intentions in the premises, *made at the time he purchased the lots and constructed the houses upon them* illustrative of his intent, formed a part of the *res gestae*, and were admissible in evidence."

In other words, the declarations of De Blainville constituted a part of the very transaction on which the cause of action in that case rested. They were not, as here, made *after* the completion of the transaction.

The case of *Bates v. Ableman*, 13 Wis. (644) 721, also cited by respondent in connection with the attempted application of the rule of *res gestae* to the declarations of Roach, afford no support to his position. This case, as we read it, is against him. There the validity of an assignment by a party for the benefit of his creditors was the question in controversy. The trial court refused to allow a witness to testify to declarations made by the assignor in insolvency after the assignment as to his intention in making it. The Wisconsin court, speaking of this ruling, said: "We think it [the testimony] was properly excluded. The statements of Seymour were not those of

a party to the suit, and were not admissible on that ground. They were not admissions of a vendor with respect to his title, made before he had parted with it. They were no part of the *res gestae*. We can therefore see no principle of evidence upon which they could be admitted. It is undoubtedly true that, where the intent of a party to a sale is in issue, his statements *at the time, and so connected with the transaction as to be a part of the res gestae*, are competent evidence to show such intent, even though the person is not a party to the suit. But where *they are not so connected with the transaction*, but are offered as mere admissions after it occurred, *he not being a party to the suit*, they are no more competent for that purpose than they would be to prove any other material fact. They are then mere hearsay. And, although a person may be presumed to know very well what his intention was, yet that fact does not make his mere statements, not under oath, proper evidence to prove it, any more than any other material fact, equally well known to a witness, could be proved in the same way." We think the foregoing language very clearly expresses the situation here.

The very recent case, *In the Matter of the Estate of Henry Gird, Deceased*, 157 Cal. 534, [108 Pac. 499], was where the question whether the decedent was the father of the distributees of the estate of the deceased was the vital issue. A futile attempt was made to prove certain declarations alleged to have been made by the mother of said distributees to a doctor, some months prior to the birth of one of the children, "to the effect that she was 'in the family way' by one Smith, and that she desired to be rid of the child by an operation." Upholding the ruling of the trial court excluding said declarations, the court says: "This proposed evidence was properly excluded by the trial court. Alice was not a party to this proceeding, but only a witness on behalf of her children. Evidence of these declarations by her to the physician would have been pure hearsay, in no way binding on her children as evidence on the question of paternity. Being contrary to her evidence given on that question, the declarations, waiving other objections thereto, would have been admissible by way of impeachment of Alice as a witness, but a complete answer to appellants' claim in this regard is that no foundation was laid for any such impeachment on the examination of Alice."

There is, as we have declared, no express rule of evidence or principle of law which would authorize the proof of these declarations for any other purpose than as a matter of impeachment, except, of course, in those cases where the declarant is a party to the action. In addition to section 1850 of the Code of Civil Procedure, counsel for respondent refers to sections 1851 and 1854, of the same code, as authorizing this evidence. The sections so cited, as well as section 1870 of said code, specifically point out the kinds of declarations that are competent to be proved and the conditions upon which they may be given in evidence. The declarations here do not come within any of the sections mentioned. They were, in other words, neither admissible as "against interest," within the purview of any section of the code authorizing proof of extrajudicial declarations, nor as "*prima facie* evidence between the parties" to this action, within the meaning of section 1851 of the Code of Civil Procedure, nor as "a part of an act, declaration, conversation or writing" which had been given in evidence, within the contemplation of section 1854 of said code.

That the effect of the rulings of the trial court admitting these declarations was to greatly prejudice the rights of plaintiff in the action cannot for a moment be doubted. The instrument which is the main subject of this controversy appears, from its language, to be nothing more than a mere option, or as involving only the bestowal upon Roach by Dicken of the right to accept or reject, within a certain time, the offer therein contained to buy the property mentioned at the price named. It is plainly apparent, therefore, that, in order to show that the transaction resulting in the execution of the instrument by Dicken constituted an executory contract of sale, parol testimony was absolutely necessary to be received. In fact, the rulings of the court admitting testimony *aliunde* the instrument itself for the ascertainment of its intent conclusively show that the court was in doubt as to the legal effect of the transaction as evidenced by the writing, for it may safely be assumed that, if the language of the instrument itself had been reasonably clear in the expression of the intent of the parties to the transaction, the court would have neither required nor allowed parol testimony to be introduced upon the subject, since, under such circumstances,

testimony independent of the writing itself would not have been necessary to aid the court in the construction of the instrument. Clearly, then, the court, in forming its conclusion as to the nature in legal effect of the relations established between Dicken and Roach by the transaction, must have been influenced to a very great extent by the evidence of the declarations of Roach, not a party to the action, made after the completion of said transaction.

Of course, if, as we have in effect before observed, some *competent* evidence had been received showing that the transaction was of the nature claimed for it by respondent, a reviewing court would not perhaps feel justified in disturbing a finding based upon such testimony. But the situation here is that the court's general findings (there is no specific finding upon the point under consideration), which necessarily embrace a finding that the transaction between Dicken and Roach amounted to an executory contract of sale, must rest, if at all, solely upon a construction of a writing whose language is apparently opposed to such construction.

But even if it could be said that there is *some* language in the instrument which lends some color to the construction which the court has given it, the evidence of the declarations of Roach must, nevertheless, be held to have been prejudicial.

In *Estate of James*, 124 Cal. 653, [57 Pac. 578, 1008], it was contended "that there is sufficient evidence in the record, which came before the court without objection, to support the findings of fact, and that, therefore, even conceding the admission of evidence under objection which should have been denied admission, still a new trial for the aforesaid reasons should not be ordered." In answer to that contention, the court said: "This position cannot be sustained. If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows, it may have been that particular evidence which turned the scale and lost the case to appellants. This must of necessity be the rule wherever improper evidence has been admitted which upon its face *tends in any degree to affect the final conclusion of the court.*" (Italics ours.)

There can be no doubt, as previously suggested, that the evidence of Roach's declarations contributed in no small degree to the conclusion reached by the trial court with regard to the nature of the transaction between Dicken and Roach.

There are some other questions discussed by counsel in their briefs, but the point to which we have solely addressed our attention is conceded by counsel for the respondent to involve the pivotal proposition in the controversy, and, therefore, in view of our conclusion as to said point, others need not be noticed.

The order refusing plaintiff a new trial is reversed and the cause remanded to the court below for trial *de novo*.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 25, 1910.

[Crim. No. 157. Second Appellate District.—July 1, 1910.]

THE PEOPLE, Respondent, v. CHARLES C. GRIDER,
Appellant.

CRIMINAL LAW—ORDER DENYING NEW TRIAL—APPEAL IN OPEN COURT FROM JUDGMENT AND ORDER—AMENDMENT AS TO METHOD—REVIEW ALLOWED.—An appeal in open court from an order denying a new trial still exists under section 1237 of the Penal Code, and although, since the amendments of 1909 to sections 1239, 1240 and 1241 of that code, no special method is provided for taking such appeal, yet upon an appeal in open court from the judgment and order, the order after judgment presented in the record may be reviewed, under the terms of section 1259 of the Penal Code.

ID.—GRAND LARCENY—OBTAINING DIAMOND RING WITH INTENT TO STEAL—SUPPORT OF VERDIOT.—Under an information for grand larceny committed by defendant in stealing a diamond ring worth \$550, where the evidence shows that the ring was obtained from the prosecutrix by defendant, as her agent, under a fraudulent assertion that it was necessary to obtain an exchange of plaintiff's lot for other lots, whose owner had proposed a different method of exchange, to defendant's knowledge, and neither proposed to exchange it for the ring nor knew of the obtaining of the same, it

is held that from such facts, the jury may reasonably infer that at the time of obtaining the possession of the ring defendant feloniously intended to convert the same to his own use, and that the evidence is sufficient to support the verdict of guilty, as charged.

ID.—THEORY OF CASE—OBTAINING POSSESSION BY FRAUD OR ARTIFICE—TITLE NOT PARTED WITH—INSTRUCTIONS.—The theory of the case for the prosecution was properly supported by instructions that the case for the people was limited to the taking of the ring by fraud, trick or device of defendant, and that “when by means of fraud or artifice, or any other kind of contrivance, the possession of personal property is fraudulently obtained from another, and the party so obtaining the possession acquires it with the intention of stealing the property when he gets possession of it, then the crime is larceny, provided the person from whom the property is taken still remains the owner of the property, and has not parted with the title,” and that in order to convict the defendant, the jury must believe that the prosecutrix “did not at the time intend to part with her ownership in said ring, but was induced by fraud of the defendant to part with the possession,” there being at the time “a felonious intention on defendant’s part, in taking said ring, to steal said ring.”

ID.—EVIDENCE CONSISTENT WITH INSTRUCTIONS—STATEMENTS OF COMPLAINING WITNESS—Held, that the statements disclosed by the evidence, as made by the complaining witness, were consistent with the crime of larceny, as defined by the instructions; and that these statements, with other evidence, justified the jury in concluding that defendant obtained the ring fraudulently from the complaining witness, knowing that she had no intention of parting with the title to him. They might have found from her statements that he obtained possession of the ring against her will, and retained its possession by fraud; and they certainly might find from the evidence that it was his intention from the beginning to obtain it by force or fraud, and to appropriate it to his own use.

ID.—NATURE OF LARCENY OF RING DISTINGUISHED.—The nature of the larceny of the ring, as distinguished from the crime of false pretenses or embezzlement, is that its owner had no intention to part with her property therein to the person taking it with intent to steal it, although he may intend to part with the possession thereof.

ID.—NATURE OF CRIME OF FALSE PRETENSES.—In the crime of false pretenses the owner does intend to part with his property in the money or chattel to the person to whom he delivers possession, but is induced to do so by the fraud or false pretenses of such person or someone on his behalf.

ID.—DISTINCTION BETWEEN “LARCENY” AND “EMBEZZLEMENT.”—As between a “larceny” of the character here involved and an “embezzlement,” the chief distinction is the presence of the false and

felonious intent with which the possession of the property is procured by the accused in the case of the larceny and the absence of this in embezzlement.

ID.—STATEMENTS NOT SHOWING "FALSE PRETENSES" OR "EMBEZZLEMENT BY AGENT."—The statements made by the appellant, which are held consistent with the crime of larceny, do not show that she parted with the title by reason of false pretenses, nor that defendant came lawfully, as distinguished from fraudulently, into the possession of the property as the agent of the complaining witness.

ID.—VARIANCE NOT SHOWN—CODE PROVISION NOT RELIED UPON.—Measured by proper distinctions, it is held that there was no variance between the proof and the charge of grand larceny in the information; and the use of the words, "fraud, trick or device," did not indicate that section 332 of the Penal Code was relied upon to secure a conviction.

ID.—PROPER REFUSAL OF REQUEST—HONEST BELIEF OF RIGHT TO RING.—The court properly refused to give a requested instruction as to the honest belief of the defendant that he was entitled to the ring, where the instructions given by the court in this matter were all that the defendant could ask.

ID.—MISCONDUCT OF DISTRICT ATTORNEY PREJUDICIAL—GROUND FOR REVERSAL.—*Held*, that the misconduct of the district attorney in the asking of improper questions, and maintaining a general atmosphere of adverse comment, remark and running argument throughout the trial, showed that his presumed purpose was to prejudice the jury against the defendant, and constituted ground of reversal of the judgment and for a new trial.

ID.—ASKING IMPROPER QUESTIONS—TEST OF MISCONDUCT.—When an improper question is asked by the district attorney, the test whether it was misconduct is, What was his purpose in asking the question? If it was to take an unfair advantage of the defendant by intimating to the jury something that either is not true or not capable of being proven in the manner attempted, then it is error. If he knows when he asks the question that an objection to it should or will be sustained, the error is not corrected, because the objection is sustained.

ID.—ASKING QUESTIONS OF DEFENDANT KNOWN TO BE WRONG.—Where the prosecuting attorney asks questions of the defendant which he knows to be wholly wrong or without expectation of answers, or to be withdrawn if objected to, and the clear purpose is to prejudice the jury against the defendant in a vital matter by the *mere asking* of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have prejudiced the jury.

ID.—REMARKS OF TRIAL JUDGE NOT MISCONDUCT.—*Held*, that none of the remarks of the trial judge constitutes misconduct on his part,

and that his rebukes to counsel were proper under the circumstances appearing.

ID.—VITAL ELEMENT TO BE CONSIDERED IN CONNECTION WITH MISCONDUCT—QUESTION OF INJURY—PRESUMPTION—BURDEN OF PROOF.—

The vital element to be considered in connection with all irregularities or misconduct of court, counsel, party, or jury, is whether the substantial rights of the complaining party are materially affected thereby. This being shown, it will be presumed that he was injured, unless the contrary affirmatively appears. The burden is on the moving party to show the irregularity or misconduct, which might have prevented a fair trial; when this is done, the burden shifts to the successful party to show, as matter of fact, that the irregularity or misconduct did not affect the result.

ID.—NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.—*Held*, that the showing of newly discovered evidence is not such as to warrant this court in saying that the trial court abused its discretion in not granting a new trial on this ground, whether it be considered as evidence affecting the issues tried, or as impeaching evidence tending to weaken the testimony of the complaining witness.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. George R. Davis, Judge.

The facts are stated in the opinion of the court.

Milton K. Young, W. Ona Morton, Earl Rogers, and W. H. Dehm, for Appellant.

U. S. Webb, Attorney General, and George Beebe, Deputy Attorney General, for Respondent.

TAGGART, J.—Information for grand larceny, verdict of guilty and sentence of imprisonment in state's prison for two years. Appeal in open court from judgment and from order of court denying defendant's motion for a new trial.

The attorney general objects to the consideration of the appeal from the order denying defendant's motion for a new trial on the ground that, although such an appeal still exists under section 1237 of the Penal Code, by reason of the amendment of sections 1239, 1240 and 1241 in 1909, no method for taking such an appeal is now provided by law; that, prior to the amendments referred to, a method of appeal from the judgment or *any* order was provided by section 1239, whereas,

now the appeal in open court is limited to the judgment and orders made *after* judgment, and therefore does not include orders relating to a motion for a new trial. While the view of the attorney general would be correct, if this matter were considered only in connection with the sections mentioned, under section 1259 of the Penal Code, all matters in the record may be reviewed by this court if properly presented. This objection is urged as affecting only the error assigned by the misconduct of the district attorney.

The larceny of appellant was predicated upon the taking from the complaining witness of a diamond ring of the value of \$550. Owing to the pressing demands of the holders of some liens thereon, the complaining witness called upon the defendant, who was a real estate dealer, to negotiate a sale or exchange a lot in Venice belonging to her. According to her testimony, defendant advised her that one McCarthy would exchange two lots in Redondo for her Venice lot and a sealskin coat which she owned. To this she assented, but later defendant told her that McCarthy would trade if she put up the ring instead of the coat, but would not otherwise. She at first refused to part with the ring, but defendant insisted, and reminded her of her possible loss of the Venice lot if she did not make the trade. As she testified: "I took it [the ring] off my finger [and had it in my hand and], he took it out of my hand while we were discussing the matter." Not being able to get the ring back, she consented to its use, if necessary, to carry out the trade with McCarthy, but for no other purpose. Defendant never returned the ring to her, and McCarthy testified that he accepted the proposition to trade for the sealskin coat, but that in his negotiations with the defendant no mention was made of any ring; that he never demanded one and never received one. As these negotiations were all had prior to the time of the taking of the ring by the defendant, an intent upon his part to convert the ring to his own use at the time of procuring it from the complainant might reasonably be inferred from these facts.

In presenting the first point made by appellant, to wit, that the evidence is insufficient to justify the verdict, it is contended that certain statements which the complainant testified to having made to others, about the transaction, are inconsistent with the facts necessary to constitute a larceny. For

instance: "The worst of the whole thing is that I had to give up my ring"; and "I said it would only be with that provision that if it was necessary to use the ring in the Redondo lots, but if it was not necessary, that the ring should be returned to me, and in no way was the ring to be used in any other way. I didn't want to use it then." The theory upon which the case was tried is indicated in the instructions given by the trial court. The jury were instructed that the case for the people was limited to a taking by fraud, trick, or device, and that "the law is, that when by means of fraud, or artifice, or any other kind of contrivance, the possession of personal property is fraudulently obtained from another, and the party so obtaining the possession acquires it with the intention feloniously of stealing the property when he gets possession of it, then the crime is larceny; provided, the person from whom the property was taken still remains the owner of the property, and has not parted with the title. One of the questions, therefore, for the jury to consider in this case is, whether there was a parting with the title by the witness A. D. Van Houten." It also instructed them that in order to convict the defendant the jury must believe, "that she did not at the time intend to part with her ownership in said ring, but was induced by fraud of the defendant to part with the possession," there being at the time a "felonious intention on defendant's part, in taking the ring, to steal the said ring."

The distinction between "false pretense" and "embezzlement" on the one hand and larceny on the other, is clearly recognized by these instructions, and the statements quoted from the complaining witness' testimony are entirely consistent with the crime of larceny. These statements do not, as appellant contends, show that she parted with the title by reason of false pretenses, nor that defendant came lawfully, as distinguished from fraudulently, into the possession of the property as the agent of Mrs. Van Houten. These statements, together with the other evidence in the case, justified the jury in drawing the inference that the defendant obtained the ring with the felonious intent to convert it to his own use, by means of his misrepresentations as to the McCarthy trade, knowing that the complainant had no intention of parting with the title to him when she gave him the possession

of it. Indeed, under the evidence, they might well have found that he obtained possession of it against her will, and retained it (the possession) by fraud, and that she did not give it to him at all. They were justified in finding from the evidence that it was his intention from the beginning to obtain it by force or fraud and appropriate it to his own use.

In a larceny of the kind under consideration the owner of the thing has no intention to part with his property therein to the person taking it, although he may intend to part with the possession. In false pretenses the owner does intend to part with his property in the money or chattel to the person to whom he delivers the possession, but is induced to do so by the fraud or false pretenses of such person or someone on his behalf. (*People v. Delbos*, 146 Cal. 734, 736, [81 Pac. 131].) As between a larceny of this character and an embezzlement, the chief distinction lies in the presence of the fraudulent and felonious intent with which the possession of personal property is procured by the accused, in the case of the larceny, and the absence of this in embezzlement. Measured by these distinctions, the evidence here does not disclose a variance, as appellant contends, but sustains the charge in the information. It seems hardly necessary, in the light of what is said above, to distinguish the charge here and the evidence in its support from the acts punishable under section 332 of the Penal Code. The use of the terms "fraud, trick, or device" by the trial court in its instructions does not imply that this section was invoked to secure a conviction. The instruction in which these words appear is one in which the crime of larceny is being defined by the court, and if the element of "felonious" intent be necessary, it is sufficiently supplied elsewhere to prevent prejudice. The instruction is not one which directs a conviction. This is true of the other instructions of similar purport to which exception is taken.

The refusal of the trial court to instruct the jury as requested by the defendant with reference to his honest belief that he was entitled to the ring was not error. The instruction given by the court on this matter was all that defendant could ask.

It is also contended that defendant was deprived of a fair trial by the misconduct of the district attorney during the trial of the cause. Among the instances of misconduct as-

signed as error are the following: An expert witness testifying to the value of the diamond in question on behalf of the prosecution exhibited a diamond belonging to himself, which he characterized as an exact match for the one in question in the case, and the defendant asked that this diamond be made an exhibit in the case. To this the district attorney objected, as he stated, "in view of the fact that the defendant himself has the ring alleged to have been stolen in this case, and in the absence of any showing . . . that he cannot produce it, . . . when there is no showing that the real thing, the stolen diamond, the ring alleged to have been stolen, could not be produced in court." After objection made, the court directed the first sentence reread by the reporter, and ordered it stricken out, and instructed the jury to disregard it. Nothing was said or done as to the rest of the statement, although the entire language was objected to. On the cross-examination of the defendant, in seeking to elicit evidence tending to show that the complaining witness was under great financial stress of which defendant had taken advantage, the district attorney asked the question: "Didn't she give that reason in her conversation that she would turn that property over because of the judgment?" The witness replied: "I think Mrs. Van Houten said that she would not transfer that lot, or make a deal on account of the judgment, because she didn't have the money to pay for it, if I remember correctly." Whereupon, the district attorney made the following comment: "Yes, I think that was right; she didn't have the money and she was under this burden; she had to get out from under it as fast as she could, and she went to you to help her out." This was followed by the question: "I think that was the way, wasn't it?" No answer to this question was sought and none was given. On another occasion, in cross-examining the defendant as to a conversation had with the complainant, the district attorney asked this question: "Didn't she say in that conversation that she had talked with her attorney, and he had said for her to have absolutely nothing to do with you unless you could be bound up in black and white?" Upon an objection being made to this question, the district attorney withdrew it, but added to his statement making the withdrawal: "The defendant knows all about it." To this remark the defendant's counsel ex-

cepted and objected on the ground that this was an improper method of getting before the jury a matter which was not evidence.

Were these the only matters, perhaps it might be said that they are not sufficient to justify the setting aside of a verdict of guilty and a reversal of the judgment, but these are only instances showing the general atmosphere of adverse comment, remark, and running argument of the case by the district attorney throughout the trial. In a number of instances, under the guise of stating the purpose for which evidence was sought to be introduced, the conclusions and deductions of the district attorney and comments upon the evidence already in were made. These arguments were objected to, and in some instances the court instructed the jury in relation thereto; at other times these remarks were unrebuked and no instructions given, and in one instance, while the evidence was being received, when the attorney for defendant objected to the district attorney making a speech before the jury, the trial court, instead of suggesting that the remarks be confined strictly to what was proper, said: "No. I want to hear this. But you can take your exception."

The language of the district attorney preceding this objection was: "I will have to state my purpose is to show by this witness—it runs to the intent of the defendant, and his good faith in dealing with the prosecuting witness in this case relative to this ring. In other words, had he been seeking every opportunity possible to place this prosecuting witness—" (Here interrupted by the objection and remark of the court.) After an argument in similar vein to that apparent in the last sentence, covering a page of the transcript, the district attorney was again interrupted by defendant's counsel, whereupon the court said: "In order that there may be no prejudice, the jury are instructed that what the attorney says is not evidence." In another instance the district attorney, in stating his purpose for introducing certain acts and statements of defendant, said they would "indicate that his intention, possibly from the very earliest acquaintance with this woman, after, as she has testified, he continually admired the ring, and continuously schemed and devised and practiced artifice and fraud. with a view to obtaining possession of that

ring—what for? In order to steal it.” There are numerous other instances of similar character.

Where an improper question is asked of a witness by a district attorney, the test whether it is misconduct is found in answer to the question: “What was the purpose of counsel in asking the question?” If it was to take an unfair advantage of the defendant by intimating to the jury something that was either not true or not capable of being proven in the manner attempted, then it is error. And if the district attorney knows when he asks the question that an objection to the question should or will be sustained, the error is not corrected because the objection is sustained. Where the prosecuting attorney asks a defendant questions which he knows to be wholly wrong, and where the questions are asked without expectation of answers, or where they are asked and withdrawn upon objection, and the clear purpose is to prejudice the jury against the defendant in a vital matter by the *mere asking* of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict. (*People v. Wells*, 100 Cal. 459, [34 Pac. 1078].)

When a district attorney desires to introduce evidence of guilty knowledge on the defendant's part, or evidence that is a part of a system, scheme, or conspiracy to commit the crime charged, or any other evidence properly admissible, and the purpose is not clearly apparent from the question propounded, he should state to the court upon what ground he bases his right to have the evidence admitted. If its relevancy to the purpose declared is not then made apparent to the court, he may state the relation of the facts sought to be elicited to those constituting the crime. In doing this he should have due and proper regard to the fact that his proffer is being made in the presence of the jury, that it is merely tentative, and may be denied by the court, and that what is said ought not to be so stated as to give any color to the case in the minds of the jurors. When the evidence is all admitted and the testimony closed, it is early enough for the jury to consider it, and the views of the district attorney as to its weight *must* be reserved until the proper time to argue the case arrives. For him to do otherwise would be to induce

the jurors to violate the oath taken by them at each adjournment of the court "not to form or express any opinion upon the case until it is finally submitted to them." The persistent argument of the facts of the case by the district attorney here whenever an objection was made by the defendant to a question propounded by the district attorney, or at least for quite a number of times, was certainly prejudicial. There can be no doubt that the iteration and reiteration of these conclusions and arguments were intended to support what the district attorney regarded as a weak point in his case. It was his apparent intention to influence the jury, and we cannot say that he did not.

The rule was properly stated by the trial court when it rebuked the attorney for defendant for commenting on the testimony of the complaining witness in the following language: "I don't want you to pass those sort of strictures upon the witness, because that may have a tendency to prejudice the jury against the witness, which, if such feeling is created, ought not to be done, at least before the final argument of the case." This and several other remarks of the trial judge are assigned as misconduct on the part of the court and as showing feeling upon the part of the judge adverse to the defendant. The trial judge's rebuke to counsel in the foregoing language was proper under the circumstances. The other remarks of the court which are assigned as misconduct do not indicate any feeling of prejudice toward defendant or his case. It is not necessary that we determine whether or not the trial court violated the rule recognized by the supreme court in *People v. Blackman*, 127 Cal. 248, [59 Pac. 573], and *People v. Tupper*, 122 Cal. 424, [68 Am. St. Rep. 44, 55 Pac. 125], by being absent from the courtroom temporarily during the time counsel was arguing the case to the jury, but we think it our duty to say, that while those cases are accepted as precedents by the appellate courts of the state, absences of trial judges from the courtroom while the trial is in progress, however brief, cannot be safely indulged in.

The showing of newly discovered evidence is not such as to warrant us in saying the trial court abused its discretion in not granting a new trial on this ground. This is true whether we consider it as evidence affecting the issues tried, or as impeaching evidence tending to weaken the testimony of the

complaining witness. The effect of the evidence, considered in either way, is a matter which the trial court is best qualified to pass upon, and its conclusion will not be disturbed in this instance.

Loath as appellate courts are to set aside verdicts or reverse judgments in criminal cases upon the ground that the defendant's rights have been prejudiced by the misconduct of district attorneys alone, this has been found necessary in at least two recent cases. (*People v. Mohr*, 157 Cal. 732, [109 Pac. 476]; *People v. Derwae*, 155 Cal. 592, [102 Pac. 266].) In the latter case the court, in speaking of the effect of the rebuking of counsel by the court as a correction of the error, quotes from *People v. Valliere*, 127 Cal. 65, [59 Pac. 295], as follows: "Rebukes do not seem to have any effect upon prosecuting officers, and probably as little on juries. The only way to secure fair trials is to set verdicts so procured aside."

The vital element to be considered in connection with all irregularities or misconduct of court, counsel, party or jury, is, are the substantial rights of the complaining party materially affected thereby. This being shown, it will be presumed that he was injured, unless the contrary affirmatively appears. In other words, the burden is on the moving party to show the irregularity or misconduct which might have prevented a fair trial; when this is done, the burden shifts to the successful party to show as a matter of fact that the irregularity or misconduct did not affect the result. It is the reasoning of this rule which underlies the declaration of the court in *People v. Wells*, 100 Cal. 459, [34 Pac. 1078], that where the misconduct of a district attorney tends to prejudice the jury against the defendant, in a vital matter, the judgment will be reversed unless it appears that the asking of the improper questions complained of could not have influenced the verdict. We are unable to say that the misconduct did not influence the jury in this case.

Judgment and order reversed and new trial ordered.

Allen, P. J., and Shaw, J., concurred.

[Civ. No. 818. Second Appellate District.—July 5, 1910.]

EDWARD S. TUTT, Respondent, v. WILLIAM J. DAVIS, Appellant, and JASPER DAVIS, Codefendant.

SPECIFIC PERFORMANCE—CONTRACT OF SALE—REAL ACTION—SERVICE OF SUMMONS BY PUBLICATION—JURISDICTION.—An action to enforce specific performance of a contract for the sale of real property is one to determine a right or interest in real property, within section 412 of the Code of Civil Procedure, and the service of summons therein may be made by publication thereof, and such service is sufficient to give the court jurisdiction of the action.

ID.—MOTION TO VACATE ORDER OF PUBLICATION—PROPER DENIAL.—The court did not err in denying a motion of the defendant to vacate the order for publication of the summons in such action.

ID.—EVIDENCE—MEMORANDUM OF CONTRACT—ASSIGNMENT—FAILURE TO RULE ON OBJECTIONS—EXTENT OF PREJUDICE—PROPER EVIDENCE—FINDINGS.—The extent to which defendant was prejudiced by the failure of the court to rule upon his objections to the admission in evidence of the memorandum of the contract of sale, and the assignment of it to plaintiff, is measured by the injury which would result from their improper admission. It is a sufficient answer to such failure that they were properly admitted, and that the findings are conclusive that they were received and considered in evidence.

ID.—MEMORANDUM A SUFFICIENT CONTRACT—SIGNATURE BY PARTY TO BE CHARGED—MUTUALITY—TENDER AND SUIT.—The memorandum was a sufficient contract on which to base the action. It named both parties, fixed the terms of sale, and was signed by the party to be charged. Mutuality attached by the tender and subsequent suit.

ID.—CERTAINTY OF CONTRACT—MODE OF SECURING DEFERRED PAYMENTS—VENDOR'S LIEN.—The contract was not rendered uncertain from failure to specify a method of securing deferred payments. In the absence of specific agreement by which deferred payments and the interest thereon are to be secured in the sale of real property, the law fixes the security through a vendor's lien.

ID.—TIME FOR DEED—LAST PAYMENT TO BE MADE OR TENDERED.—The law fixes the time for a deed in a contract for payment of the purchase money in installments, with interest on deferred payments when the last payment is made or tendered.

ID.—CONTRACT ASSIGNABLE BY PURCHASER.—The interest of the purchaser named in the contract of sale is assignable, and the assignment passes all of the interest of the purchaser to the assignee.

ID.—PURCHASE BY PARTNERSHIP IN FIRM NAME—ESTOPPEL OF VENDOR.—Where the defendant, as vendor, dealt with a partnership

doing business by the firm name of the "Southern California Realty Co.," consisting of two partners, one of whom witnessed his signature to the contract, the defendant is not in a position to question the authority of the partnership to enter into the original contract sought to be specifically enforced.

ID.—REAL ESTATE FIRM—ASSETS DEEMED PERSONAL—AGENCY OF ONE PARTY TO ASSIGN IN FIRM NAME.—The partnership being for the purpose of dealing in real estate, as between the partners, in the settlement of their equities, the assets of the firm must be regarded as personal property; and the agency of one of the partners is a sufficient authority to execute an assignment of the contract in the firm name.

ID.—TENDER OF FINAL PAYMENT—DEMAND FOR DEED—DEMAND FOR POSSESSION NOT REQUISITE.—Where the final tender was made, no demand for possession was requisite. The demand for a deed, if complied with, would confer a right of possession without demand.

ID.—AGREEMENT NOT WITHDRAWN BY VENDOR—RETENTION OF MONEY PAID.—No withdrawal from the agreement by the vendor based upon a tender of the money received thereunder is made to appear. One cannot be said to have withdrawn from an agreement by simply expressing a desire or intention to do so, while he retains the consideration paid him on account of its execution.

ID.—LACHES NOT IMPUTABLE TO PLAINTIFF.—Laches cannot be imputed to plaintiff in bringing the action because of a delay of a little over three months after the cause of action arose before suit was brought, especially in view of the fact there is nothing in the record indicating any fluctuations in value between those dates.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Frank F. Oster, Judge Presiding.

The facts are stated in the opinion of the court.

Bert F. Mull, for Appellant.

A. C. Lawson, and Kendrick, Knott & Martin, for Respondent.

ALLEN, P. J.—The action was one for a decree requiring defendant to specifically perform a contract for the conveyance of real property. It is based upon an agreement between defendant and plaintiff's assignor, which is in the words and figures following:

“Long Beach, California, Oct. 26th, 1904.

“Received of Southern California Realty Co., one hundred (\$100) dollars as deposit and part payment on the west 140 feet of lots 10, 12, in block 67 of the city of Long Beach, county of Los Angeles, state of California.

“Certificate of title to be furnished showing said property free of all encumbrances; also deed properly signed and executed.

“Price to be thirty-five hundred (\$3500) dollars net to seller; terms, fifteen hundred (\$1500) dollars cash, balance payable \$1000 in one year and \$1000 in two years, with interest at 7% on deferred payments.

“W. J. DAVIS.

“L. F. OAKES,

“Witness to Signature of W. J. Davis.”

It is averred that Oakes subscribed his name as witness at the request of defendant Davis, and that the instrument, duly acknowledged so as to entitle it to record, was recorded in the records of Los Angeles county, state of California, on November 22, 1904; that on the date of the execution of the instrument L. F. Oakes and one Bixby were partners engaged in buying and selling real estate in Los Angeles county, and doing business under the firm name and style of the Southern California Realty Company. It is further averred that said firm paid the cash payment mentioned in the agreement; that the total consideration agreed to be paid for the property was the fair market value of the same at the time of the agreement, and was as to all parties fair, just and equitable. It is further averred that on November 21, 1904, notwithstanding defendant's failure to provide the certificate of title as specified, the firm tendered to defendant the balance of the cash payment; that on the 13th of December following such firm assigned and transferred to plaintiff the agreement, with all their right, title and interest to the property described, which said agreement is in the words and figures following:

“For value received we have assigned and set over, and do hereby assign and set over, all our right and interest in, to and under the within agreement to Edward S. Tutt.

“Dated this 13th day of December, 1904.

“SOUTHERN CALIFORNIA REALTY CO.,

“Per L. F. OAKES.”

This assignment was indorsed upon said agreement executed by defendant Davis. Thereafter, on the dates fixed in the agreement for making the deferred payments, plaintiff tendered the amounts thereof, with interest as specified in such agreement, and on the 26th of October, 1906, tendered to defendant the full sum of \$3,400, with interest as specified, and demanded that defendant execute a deed conveying said property, which defendant has failed and refused to do. It is further averred that plaintiff is ready and willing, and has been at all times, to pay said purchase price, together with interest thereon, and the amount was brought into court and offered to defendant in payment thereof. That defendant Davis on August 14, 1906, made a pretended conveyance of said property to himself, in which he is designated as grantee therein under the name of Jasper Davis, but that said William J. Davis and Jasper Davis are one and the same person; that the deed was made without consideration, and for the sole purpose of annoying plaintiff and hindering and delaying the enforcement of the agreement held by plaintiff.

Issue was made as to all the allegations of the complaint. Upon the trial, the court found in favor of plaintiff, and that all the allegations of the complaint were true and the allegations of the answer untrue, and rendered a judgment and decree accordingly in plaintiff's favor, from which defendant William J. Davis appeals under the alternative method.

It is insisted by appellant that the substituted process shown to have been made in the action was insufficient to give the court jurisdiction. We think that in actions of this kind service of process may be made by publication. The action being one for the determination of a right or interest in real property (*Grocers' Union v. Kern etc. Co.*, 150 Cal. 473, [89 Pac. 120]) brings the same within section 412 of the Code of Civil Procedure. The rule is laid down in *Pennoyer v. Neff*, 95 U. S. 727: "In cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract respecting the same," constructive notice is held sufficient. In *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 301, [5 Sup. Ct. Rep. 135], it is said that jurisdiction may be acquired "by the mere bringing of the suit in which the claim is sought to be enforced" against the property situate within the territorial jurisdiction; that

this "may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit"; all of which is quoted with approval in *Loaiza v. Superior Court*, 85 Cal. 34, [20 Am. St. Rep. 197, 24 Pac. 707]. We find no error in the action of the court denying the motion to vacate and set aside the order for publication of summons.

It is claimed that the trial court neglected to make a formal ruling upon objections to the admission in evidence of the memorandum and the written assignment. Conceding this to be true, the extent to which defendant could be prejudiced thereby is measured by the injury which would have resulted from their improper admission. The findings are conclusive that the instruments were received and considered in evidence, and we think that they were properly received. The memorandum was sufficient as a contract upon which to base the action. (*Bird v. Potter*, 146 Cal. 288, [79 Pac. 970].) Mutuality attached by the tender and subsequent suit. (Civ. Code, sec. 3388.) It is claimed that the memorandum was uncertain, in that the manner of securing the deferred payments did not appear. In the absence of specific agreement by which deferred payments are to be secured in the sale of real property, the law fixes the security through a vendor's lien. The law also determines that the time for delivery of the deed under a contract of this kind is when the last payment is made or tendered. We regard the agreement as an assignable one (Civ. Code, sec. 1458), and the assignment sufficient to pass the interest of plaintiff's assignor. Defendant, having dealt with the partnership, is not in a position to question its authority to enter into the original contract. (*Fresno Canal Co. v. Warner*, 72 Cal. 380, [14 Pac. 37]; *Yancy v. Morton*, 94 Cal. 560, [29 Pac. 1111].) The partnership being one for the purpose of dealing in real estate, as between the parties in the settlement of equities between themselves, the assets of the firm must be regarded as personal property (*Woodward v. McAdam*, 101 Cal. 440, [35 Pac. 1016]), and the agency of one of the partners a sufficient authority to execute the assignment in the firm name.

No demand of possession was requisite when final payment was tendered. The demand for a deed, if complied with, would confer right of possession without demand.

No withdrawal from the agreement based upon a tender of the money received thereunder is made to appear. One cannot be said to have withdrawn from an agreement by simply expressing a desire or intention so to do, while he retains the consideration paid him on account of its execution. The claim of appellant that he offered to refund the amount received by him is found by the court to be untrue.

Laches cannot be imputed to plaintiff in bringing the action, because of a delay of a little over three months after the cause of action arose before suit was brought, especially in view of the fact that there is nothing in the record indicating any fluctuations in value between those dates.

An examination of the record, or that portion thereof to which reference is made in the briefs, satisfies us that each and every finding of the court has support from the evidence.

Judgment and order affirmed.

Shaw, J., and Taggart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 1, 1910.

[Civ. No. 545. Third Appellate District.—July 5, 1910.]

GERALD S. WHITLEY and M. FISHER, Respondents, v.
ALEXANDER BRADLEY, Appellant.

ACTION FOR ACCOUNTING AND DISSOLUTION OF PARTNERSHIP — APPOINTMENT OF RECEIVER—DISCRETION—REVIEW UPON APPEAL.—The power to appoint a receiver in an action for an accounting and dissolution of an alleged partnership is one of sound judicial discretion; and unless it can be said that there appears from the record here a clear abuse of such discretion in the action of the court below in making the order appealed from, the same must stand.

ID.—EQUITABLE RELIEF BY RECEIVER WHEN INVOKED.—Equitable relief by way of the appointment of a receiver will be invoked only when the exigencies of the case clearly appear to absolutely require it for the conservation of the rights of all the parties concerned in the litigation giving rise to the application for such relief.

ID.—EXTRAORDINARY REMEDY—SHOWING REQUIRED FOR APPOINTMENT.—

The appointment of a receiver is justly regarded as an extraordinary or harsh remedy; and a court of equity will never exercise its discretion favorably to a motion invoking the aid of this remedy, except upon a clear showing that such relief is necessary in order to preserve and fully protect the rights of all parties.

ID.—PROBABLE RIGHT IN PROPERTY—DANGER OF LOSS.—

It must be made to appear that the person seeking the appointment of a receiver has at least a probable right or interest in the property or fund involved in the litigation, and that there is danger of its being lost or destroyed or misappropriated, unless a receiver be appointed *pendente lite*.

ID.—FINDING UPON CONFLICTING TESTIMONY—ABUSE OF DISCRETION NOT

SHOWN.—Where, upon conflicting testimony, the right or interest and the danger of the destruction or misappropriation of the property or fund is found to exist, a reviewing court, as a general rule, is in no position to say that the *nisi prius* court has abused its discretion in the appointment of a receiver.

ID.—FORMATION OF PARTNERSHIP PRIOR TO INCORPORATION — PARTNER-

SHIP BUSINESS NOT TRANSFERRED TO CORPORATION—RECEIVER NOT DISTURBED.—Though the parties forming a partnership contemplated the formation of a corporation which was in fact formed, but it appears that the partnership business never was transferred to the corporation, it does not affirmatively appear, on account of the mere formation of such corporation, that the court abused its discretion in the appointment of a receiver of the partnership business. It is sufficient that there is some showing that it was the original intention and agreement of the parties to form a partnership, and that they actually formed and carried on the business through that instrumentality, and that the showing is of such a character as to make it impossible for this court to reverse the order appealed from without an unwarranted interference with the discretion vested in the trial court.

ID.—LEASE TAKEN IN NAME OF PARTNERSHIP—VALUABLE ASSET.—

Where a lease was taken in the name of the partnership for the purpose of carrying on its business, such lease is a valuable asset of the business.

ID.—PARTNERS NOT PUTTING MONEY INTO BUSINESS—EVIDENTIARY FACT

—FINDING.—The fact that plaintiffs, as members of the partnership, did not put money into the business, does not change the situation as to the fact of partnership. It is a mere evidentiary consideration which cannot overthrow the finding as to the existence of the partnership.

ID.—JOINT OWNERSHIP OF PROPERTY IN PARTNERSHIP NOT ESSENTIAL TO

PARTNERSHIP.—To constitute a partnership it is not essential that there should be property forming the capital jointly owned by the partners; nor does it follow that because one partner may not put

up his share of the capital under an agreement to form a partnership, the combination so formed is any less a partnership.

ID.—PARTNERSHIP AGREEMENT—EQUAL SHARES IN PROFITS—SHARE IN LOSSES IMPLIED.—Where the express agreement was that the partners should at all times share equally in the profits of the business, it is implied, in the absence of a stipulation to the contrary, that they should also share equally the burden of its losses.

ID.—TRANSFER OF STOCK IN CORPORATION—UNEQUAL SHARES—PARTNERSHIP ASSETS NOT INURING TO CORPORATION.—Where it appears that no part of the business or assets of the corporation was in fact transferred to the corporation, it cannot be claimed that the partnership assets inured equitably to the corporation, where the stock was not equally distributed pursuant to the partnership agreement, but defendant, in violation thereof, demanded and had issued to himself more than one-half of the capital stock, instead of one-third thereof, under the partnership agreement for equal shares.

ID.—TRANSFER OF STOCK NOT CONVEYING PARTNERSHIP PROPERTY.—The transfer of stock by one of the partners to another cannot make the former any the less a partner in the property and business which were not transferred to the corporation, and could not inure to its benefit on account of unequal shares issued therein.

APPEAL from an order of the Superior Court of the City and County of San Francisco, appointing a receiver *pendente lite*. James M. Seawell, Judge.

The facts are stated in the opinion of the court.

Louis Boardman, for Appellant.

Richard C. Harrison, and R. V. Whiting, for Respondents.

HART, J.—This is an appeal from an order appointing a receiver, *pendente lite*.

The complaint alleges that “on or about the fourth day of January, 1907, at the city of San Francisco, state of California, said plaintiffs and said defendant entered into an agreement wherein and whereby said parties agreed to form a copartnership for the purpose of carrying on the business of manufacturing and selling cement wash-trays and doing a general cement construction business—said business to be conducted under the firm name of ‘California Cement Tray Company,’ and it was then and there agreed that each of said parties should furnish one-third of the necessary capital to

carry on said business and each of said parties should receive one-third of the profits of said business and be liable for one-third of the debts of the same''; that said parties ever since entering into said agreement have conducted said business in pursuance of the terms of said agreement; that said copartnership has acquired and "now owns" valuable property, consisting of a lease of land situated in the city of San Francisco and other property of different kinds of the approximate aggregate value of \$18,850; that "said copartnership is largely indebted." It is further alleged that "on or about the twenty-first day of May, 1907, said defendant denied the existence of said copartnership, denied that said plaintiffs had any interest in said business, and then excluded, and ever since has continued to exclude, said plaintiffs from any participation in said business, and ever since the last-mentioned date has taken sole charge of said business, and has retained the whole proceeds thereof and income therefrom''; that since said twenty-first day of May, 1907, said defendant has not kept up the manufacture of trays, so far as quantity is concerned, as theretofore, but has manufactured not more than one-fifth of the number of trays which had prior to that date been manufactured, and "has been, and is selling the trays on hand at prices unreasonably low, and turning the assets of said copartnership into cash and applying the proceeds thereof to his own use, and unless restrained by an order of this honorable court, will continue to do so." It is additionally averred that "it is necessary that a receiver be appointed to take possession of the assets of said copartnership and manage the said business for the benefit of the said partners and of the creditors of said copartnership."

An accounting of the business and the affairs of the alleged copartnership and a dissolution thereof constitute the ultimate relief demanded, and that in the meantime a receiver be appointed to take charge of the business and the defendant enjoined from "selling, encumbering or otherwise disposing of said property or any part thereof until the further order of" the court.

The answer specifically denies each and every material allegation of the complaint, and, by way of an affirmative defense, alleges that the defendant had for many years prior to the fourth day of January, 1907, been engaged in the manu-

facture of cement trays in the city of San Francisco; that on said date he made an agreement with the M. Fisher Company, a corporation, by which the latter was to construct the buildings "now situate on the premises described in plaintiffs' complaint herein"; that shortly thereafter, "the plaintiffs herein proposed the formation of a corporation to be known as 'The California Cement Tray Company,' to conduct said business, in which they should hold two-thirds of the capital stock thereof, and which should have the property described in plaintiffs' said complaint and conduct the business mentioned therein"; that, accordingly, said corporation was subsequently organized and "went into the possession of all the property described in plaintiffs' complaint, and has since remained in the possession of the same, and that the business mentioned in said plaintiffs' complaint has since been in the possession of and conducted in the name of said corporation; that all said property and said business is now in the possession of and being conducted by and in the name of said corporation." Defendant further alleges that plaintiff Fisher on the seventh day of May, 1907, "for a valuable consideration," assigned, transferred and delivered to defendant all the capital stock held by him in said corporation, and after such transfer said plaintiff had no other stock or further interest whatever in said corporation; that plaintiff Whitley "has not contributed or paid any money whatever toward the capital stock of said corporation, and has not paid any money whatever for the construction of the said improvements on the premises described in plaintiffs' complaint, and has not contributed or paid any money whatever in or about the manufacture or purchase of the personal property described in said complaint"; that he has not paid or contributed any money whatever as capital of the alleged copartnership, and that said Whitley has no interest in or ownership of the said property described in the complaint "as a copartner therein or otherwise."

The application for the appointment of a receiver was heard on the twentieth day of June, 1907, at which time evidence, oral and documentary, was introduced both in support of and against the allowance of said application.

The power to appoint a receiver is one of sound judicial discretion, and unless we can say that there appears from the

record here a clear abuse of such discretion in the action of the court below in making the order appealed from, the same must stand.

Equitable relief by way of the appointment of a receiver will be invoked only where the exigencies of the case clearly appear to absolutely require it for the conservation of the rights of all the parties concerned in the litigation giving rise to the application for such relief. The appointment of a receiver is justly regarded as an extraordinary or harsh remedy, and a court of equity will never exercise its discretion favorably to a motion invoking the aid of this remedy except upon a satisfactory showing that such relief is necessary in order to preserve and fully protect the rights of all the parties. (*Mead et al. v. Burk et al.*, 156 Ind. 577, [60 N. E. 338].) It must, of course, be made to appear that the person seeking such relief has at least a *probable* right or interest in the property or fund involved in the litigation, and that there is danger of its being lost or destroyed or misappropriated unless a receiver be appointed *pendente lite*; and where, upon conflicting testimony, such right or interest and danger of the destruction or misappropriation of the property or fund are found to exist, a reviewing court is, as a general rule, in no position to say that a *nisi prius* court has abused its discretion in the appointment of a receiver. (High on Receivers, 3d ed., sec. 11; *Mead et al. v. Burk et al.*, 156 Ind. 577, [60 N. E. 338]; *Copper Hill Min. Co. v. Spencer*, 25 Cal. 16; *Gillett v. Higgins*, 142 Ala. 444, [38 South. 664]; *Brown v. Vandermeulen*, 41 Mich. 418, [49 N. W. 920]; *Bank etc. v. Hardy* (Miss.), 48 South. 731; *Dawson v. Parsons*, 137 N. Y. 605, [33 N. E. 482]; *Lyle v. Commercial Bank*, 93 Va. 487, [25 S. E. 547]; *Nash v. Meggett*, 89 Wis. 486, [61 N. W. 283]; *Naylor v. Sidener*, 106 Ind. 179, [6 N. E. 345]; *Cone v. Paute*, 12 Heisk. 506; *Cameron v. Groveland Imp. Co.*, 20 Wash. 169, [72 Am. St. Rep. 26, 54 Pac. 1128].)

The determination of the question here must, therefore, of necessity rest upon the proposition whether the evidence upon which the order appealed from was made affirmatively discloses an abuse of discretion.

The contention of the appellant is that the evidence received at the hearing of the motion is insufficient to show that there ever was an agreement to organize a partnership, much less

the organization of one, between the parties to this suit; that, on the contrary, it was understood and agreed among the parties that they would form a corporation, as alleged in the answer, for the purpose of manufacturing cement trays; that the property mentioned in the complaint was acquired for the benefit of such corporation; that, in accordance with this understanding, a corporation was formed. It is further contended by appellant that the lease mentioned and claimed as partnership property is shown to have been transferred to the corporation; that the plaintiff Fisher, the evidence shows, sold and transferred whatever stock he owned in the corporation to the defendant, and that, according to the testimony, plaintiff Whitley never at any time contributed any money toward or for the benefit of either the alleged partnership or the corporation.

The claim of respondents is, as the allegations of the complaint in part show, that the original agreement between the parties was to form a copartnership, to thereafter incorporate and then to transfer the business and property of said partnership to the corporation so formed; that the property was owned and the business conducted by them as copartners, and that said property and said business have never been transferred to the corporation formed subsequently to the formation of the partnership.

We cannot say that it affirmatively appears from the record that the court was not justified in appointing a receiver, or, in other words, that the court thus abused its discretion.

Both Whitley and Fisher testified that in the early part of January, 1907, they and the defendant entered into an agreement to form a partnership for the purpose of carrying on the business of manufacturing and selling cement trays. Fisher testified that at the time now spoken of Bradley was not engaged in business. "Prior to the fire," continued Fisher (referring to the fire of 1906), "he had been in the cement wash-tray business, but not since the fire. He claimed that he had promised Mr. Whitley that at any time he [Bradley] should go into the tray business he would have him act as partner, and I acquiesced in that and said I would go into partnership with them under those conditions." The plaintiffs and defendant agreed that Bradley and Whitley should manage the business, for which each was to receive a salary.

The property upon which the building to be used for carrying on the business was erected was leased by the parties in the names of Bradley and Whitley. It was agreed that after the business was started a corporation should be organized for the purpose of conducting the business. Neither Whitley nor Fisher actually contributed any money toward establishing the business, but both testified that they were at all times ready and willing to put up their respective shares, but were told by Bradley to wait until the business was incorporated, when they would divide up the stock, the agreement being that the shares in and the profits of the business should be equally divided. Efforts were finally made to incorporate and a lawyer consulted with that view; but Bradley demanded fifty-one per cent of the stock "and," testified Fisher, "that broke this thing all to pieces, and Mr. Whitley and myself not agreeing to that, we couldn't come to any conclusion at all."

Whitley, as stated, corroborated Fisher in all important particulars as to the agreement between the parties. The parties were to be equal partners, he said, and share equally in the profits—that is, each was to have a one-third interest in the business and each to receive one-third of the profits. Whitley negotiated for the lease of the property upon which the building was erected, and he and Bradley were each to receive a monthly salary, while Fisher, not actively engaged in the management of the concern, was to receive his share of the profits only. "Before the building was completed," proceeded Whitley, "we were making trays. We carried on the business of manufacturing cement trays under the name of the 'California Cement Tray Company.' I took care of the books and handled the outside business and solicited business. Mr. Bradley took charge of the making of the trays and selling them. Mr. Fisher was the silent man, and had a great deal of prestige, and is connected with Levy Brothers, who buy more material than anybody else in San Francisco." Referring to the fact that he had not put any money into the business, Whitley testified: "I had several conversations with Mr. Bradley about my putting up money. He always put it off. There was always some excuse, and we couldn't come to any agreement. I told him my money was lying in the bank any time he wanted it. . . . There was no arrangement or understanding had between me, Bradley and Fisher as to the amount

of money that any of us should put into the business, but I told Mr. Bradley my money was ready to be paid at any time. Mr. Bradley refused to take money on account. He said that he wanted all the bills to come in, and wanted the building and the plant to be put in operation, and that then we would divide up the business share and share alike, and repay him for the money that he had withdrawn from the bank with interest."

The attorney consulted by the parties with regard to the formation of a corporation prepared the papers for that purpose, and also prepared a draft of the minutes of what should take place at the preliminary meeting of the directors. McGrath, the secretary of the board of directors, testified that there was a meeting of the stockholders held on February 9, 1907, and that the business then transacted was the election of the directors of the corporation, after which, and on the same day, said directors held a meeting, at which the only business transacted was the adoption of a code of by-laws. He further testified that there were no other meetings of the directors after the ninth day of February, and that what purported in the "minute-book" of the corporation to have been an offer on the part of Bradley, Whitley and Fisher to transfer and assign to the corporation the business of cement tray-making and the property used in connection therewith, and an acceptance of said offer by the corporation through the directors, never took place. The attorney referred to corroborated these statements, saying, as before intimated, that that part of the "minute-book" referred to was prepared by him not for the purpose of representing the fact of the transfer or the offer to do so and acceptance thereof, which had then not occurred, but merely as an exemplar to be followed for the proper preservation in the "minute-book" of the record of the transaction as so carried out, in the event that at any future time such transaction should take place.

Whitley also testified that the business and property of the partnership had never been transferred to the corporation.

It may be conceded that there is not an overwhelming amount of testimony in the record showing that the parties first formed themselves into a copartnership for the carrying on of the business referred to in the pleadings and the evidence; but there is some showing that such was the original

arrangement and intention of the parties, and that they actually formed a partnership and carried on the business, for a time at least, through that instrumentality; and this showing is of a character to make it impossible for this court to reverse the order appealed from without an unwarranted interference with the discretion vested in trial courts in such matters.

The lease was taken in the names of Bradley and Whitley, and, so far as the record shows to the contrary, is still in their names. This, of itself, is a valuable asset. The property and the business were never transferred to the corporation, and the latter, although properly existing, it may be admitted, and brought into existence for the purpose of acquiring the property and business of the partnership and conducting the same, has never acquired the property and the business or either, and as such property and business must be owned by someone, ownership thereof has necessarily remained, and still remains, so far as we are advised by the record before us, in the partnership.

The fact that neither Whitley nor Fisher has put any money into the business cannot change the situation in the least. This circumstance, as an evidentiary fact, tending, it may be, to negative the proposition of a partnership, was worthy only of such weight as the court deemed it entitled to, and, no doubt, was given proper consideration by the judge in determining whether there existed a partnership between the parties under the agreement, but it by no means follows that, because one partner may not put up his share of the capital under an agreement to form a partnership, the combination so formed is any the less a partnership.

The case of *Brooke v. Tucker*, 149 Ala. 96, [43 South. 141], is in many respects almost identical with the case at bar. There a partnership was formed with an understanding between the parties thereto that later on there would be organized by the partners a corporation, to which said business would be transferred and through the agency of which the same would thereafter be carried on. We quote from the opinion in that case: "Whether complainant and Brooke are partners *inter sese* must be determined by their intention as the same is expressed in or may be gathered from the written agreement entered into by them. By the contract it is made

to appear that complainant and Brooke associated themselves together for the publication of a newspaper. It also appears that, at the time the contract was made, Brooke was the sole owner of the newspaper plant, and it may be conceded that by the terms of the contract he was to remain the owner and possessor of the legal title, and in control, until the formation of the contemplated corporation provided for by the contract; yet this of itself would not prevent the contract from being one of partnership. To constitute a partnership it is not necessary that there should be property forming its capital jointly owned by the partners. The property employed in the partnership business may be separate property of the partners; but if they share in the profits and losses arising from its use, a partnership exists. (Citing *McCrary v. Slaughter*, 58 Ala. 230, 234.) . . . While nothing is said specifically about the losses, or that complainant is to share in them, yet, construing all the terms of the contract together, it is our opinion that there is created a community of profits and loss, or, as it is expressed in one of our cases, 'a communion of profits and loss is created,' " citing a number of cases. The foregoing expressions harmonize with our code definition of a partnership. (Civ. Code, secs. 2395, 2404.)

The agreement here was that the parties should at all times participate in the profits in equal shares, and that they should equally bear the burden of the losses is implied from such agreement, there appearing no stipulation to the contrary. (Civ. Code, sec. 2404, *supra*.)

There can be no doubt that the ultimate purpose or intent of the parties was to form a corporation by and through the agency of which the business in which they had engaged was thereafter to be transacted. But there is evidence that they started to do business before a corporation was formed or before steps were taken to form one, and it was shown that they sustained some sort of relations with each other before the organization of the corporation. We think it clearly enough appears that the intention was to establish and fix as their status toward each other during their association together prior to the time at which the corporation was to be organized that of a copartnership.

Nor does the fact that Fisher transferred to Bradley stock purporting to have been issued to him in the corporation make

him any the less a partner in said property and business, since the said property and business were never transferred to said corporation. Obviously, no one can sell property and convey a valid title thereto which he does not own and to which he has no title. Even if it might be contended that, under the agreement to form a corporation at a certain time, pending which time the business and property acquired for the purposes of such a corporation were to be conducted by and owned as a partnership, the copartners would become trustees of the corporation as to such business and property upon the formation of such corporation, and that the latter upon its formation would have an equitable title to such business and property, such contention could not be successful here, since it appears from the evidence that the terms upon which the corporation here was to be formed were not kept by the defendant, who demanded, instead of one-third of the capital stock to which he was alone entitled, according to the agreement, fifty-one per cent thereof.

It is very clear that the stock issued to Fisher by the corporation could not affect the property involved here, and that Fisher's sale of said stock to Bradley conveyed nothing, so far as the property and the business of the partnership were concerned.

The cases cited by counsel for appellant to the effect that property acquired for the purposes of a corporation to be subsequently organized, *ipso facto* inures, with all its rights and advantages, to such corporation upon its formation, and that, therefore, a formal transfer of the property so acquired to said corporation is not necessary, do not fit the facts of this case as found by the court, and as are sufficiently shown by the evidence, and are, therefore, not in point here.

The order is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 821. Second Appellate District.—July 5, 1910.]

GEORGE M. PEARSON, Respondent, v. ELI E. HENDRICK and D. E. MYERS, Appellants.

ACTION FOR REASONABLE VALUE OF SERVICES — DEFENSE OF SPECIAL CONTRACT—SUPPORT OF FINDINGS.—In an action to recover the reasonable value of work and labor performed by plaintiff as a civil engineer, at defendants' instance and request, in which the answer denied any amount due, and pleaded a special contract in defense, and in which the evidence tends to show that plaintiff rendered such services as engineer to defendants at their request for two hundred days of the fair value of \$15 per day; that there was no agreement limiting the cost of the work; that no payments had been made upon those services, and that all payments made were on account of expenses incident to the employment, it is held that such evidence is sufficient to support the findings for the plaintiff, notwithstanding evidence for defendant to the contrary.

ID.—OPINION OF PLAINTIFF AS TO VALUE BASED ON PERCENTAGE IMMATERIAL—VALUE OF SERVICES OTHERWISE SHOWN.—The findings for plaintiff being established by sufficient evidence, the fact shown by the record that plaintiff founded his opinion as to the value of his services on a percentage basis is immaterial, since if plaintiff's evidence as to the value of his own services be ignored, such value is established for the plaintiff by independent evidence.

ID.—PRESENTATION OF CLAIM FOR SMALLER SUM — CLAIM FOR FAIR VALUE NOT PRECLUDED.—Though it is disclosed by the record that when plaintiff first presented his bill it was for a smaller amount, yet this would not preclude plaintiff from asserting a claim for the fair value of the services.

APPEAL from a judgment of the Superior Court of Riverside County, and from an order denying a new trial. F. E. Densmore, Judge.

The facts are stated in the opinion of the court.

Purington & Adair, for Appellants.

Miguel Estudillo, for Respondent.

ALLEN, P. J.—The action was to recover the value of certain work and labor performed and expenses incurred as a civil engineer on behalf of defendants at their special instance and request, the reasonable value of which was alleged

to have been \$5,518.55, and a balance unpaid of \$2,205.95. The answer denied the performance of the services or their value, and alleged that such services as were performed were under a special contract through which the sum should not exceed \$2,500.

Trial was had by the court, findings and judgment in favor of plaintiff, from which judgment, and an order denying a new trial, defendants appeal.

The specifications of error all relate to the insufficiency of the evidence to support the findings. An examination of the record discloses that there is evidence tending to show that plaintiff rendered services as engineer to defendants at their request for a period of two hundred days; that the fair value of such services in the locality was and is fifteen dollars per day; that there was no agreement limiting the cost of the work; that no payment had been made on account of these services, and that all the payments made were on account of expenses incident to the employment. These things being established, it is of no particular materiality that plaintiff himself should have based his opinion of the value of the services upon a percentage basis. Ignoring the plaintiff's testimony entirely as to the value of the services, it is established by independent evidence. It is true that it is disclosed in the record that when plaintiff first presented his bill, it was for a smaller amount. This, however, would not preclude plaintiff from asserting a claim for the fair value of the services. (*Lackmann v. Kearney*, 142 Cal. 115, [75 Pac. 668], and authorities cited.) In our opinion the findings have ample support, and the judgment and order should not be disturbed.

Judgment and order affirmed.

Shaw, J., and Taggart, J., concurred.

[Crim. No. 143. Third Appellate District.—July 6, 1910.]

In the Matter of the Application of PATRICK MULHOLLAND for Writ of Habeas Corpus.

HABEAS CORPUS — CONVICTION IN JUSTICE'S COURT — APPEAL TO SUPERIOR COURT — DISMISSAL.—Where a petition for a writ of *habeas corpus* shows a conviction in the justice's court for violation of the act of March 6, 1909 (Stats. 1909, p. 140), prohibiting the mooring and anchoring of house boats in rivers and streams of the state in certain limits, and avers that upon appeal to the superior court the justice's judgment was affirmed, and that the validity of the act was passed upon in the superior court, but shows no application for the writ to the superior court, as required under Rule XXVI of this court, and further shows that the appeal was dismissed by the superior court for want of jurisdiction, without a trial upon the merits, the writ must be denied.

ID.—APPLICATION BASED ON NONEXISTENT FACT.—Where the only fact stated in the petition on which the writ of *habeas corpus* was originally asked for in this court is that the validity of the act was fully heard and determined in the superior court, but the order made by the superior court shows this not to be the fact, there is no basis for the petition for the writ to this court.

APPLICATION for writ of *habeas corpus* to the sheriff of Sacramento County.

The facts are stated in the opinion of the court.

W. A. Gett, for Petitioner.

E. C. Washhorst, District Attorney, for Respondent.

THE COURT.—In the above-entitled matter it appears that petitioner was convicted in the justice's court of Sacramento township, Sacramento county, for violating the act of the legislature approved March 6, 1909 (Stats. 1909, p. 140), prohibiting the mooring and anchoring of house boats in rivers and streams of this state within certain limits.

It is averred in the petition for the writ that "the said matter came on for hearing before the superior court of the county of Sacramento, state of California, and after consideration by the same the said judgment of the said justice court was by the said superior court . . . upheld and affirmed."

It appears that no application or petition has been filed by the petitioner for a writ of *habeas corpus* in the said superior court. It appears also from the order of said court that when said appeal came on to be heard in said court the appeal was dismissed on the ground "that there is no statement on motion for a new trial settled and filed by or with the justice of the peace or filed with this court as required by law, and . . . this court has absolutely no jurisdiction of this appeal." There was, therefore, no hearing upon the merits, and the real question at issue was not before the court, namely, the validity of the act called in question.

Rule XXVI [144 Cal. l, 78 Pac. xi] provides that the application for the writ shall first be made to the lower court, unless circumstances are set forth in the application, such as the appellate court may deem sufficient to warrant the issuing of the writ originally from the appellate court.

The only fact here shown in the petition, on which the writ is asked for originally by this court, is that the matter was fully heard and determined by the lower court and the validity of the act of the legislature passed upon. The order of the lower court shows this not to be the fact.

The writ is denied.

[Crim. No. 142. Third Appellate District.—July 6, 1910.]

In the Matter of the Application of DANIEL E. OSBORNE
for Writ of Habeas Corpus.

HABEAS CORPUS—DISAGREEMENT OF COURT—DENIAL OF WRIT.—Where the appellate court, upon an application for a writ of *habeas corpus*, is unable to concur in a judgment, either for remanding the prisoner or discharging him, the writ must be regarded as denied, under section 4 of article VI of the constitution, as well as upon the authority of *Ex parte Oates*, 3 Cal. App. xiii, and *Ex parte Sauer*, 3 Cal. App. 237.

ID.—REMAND OF PRISONER TO CUSTODY—ORDER FOR BAIL DISCHARGED.—Upon the return of the prisoner to the custody of the sheriff, or upon his resumption of such custody, the order for bail pending the proceedings must be discharged, and if money was deposited in lieu of bail, it will be ordered to be returned to him by the clerk.

APPLICATION for writ of *habeas corpus* to the sheriff of Napa County.

The facts are stated in the opinion of the court.

Theodore A. Bell, for Petitioner.

James A. Nowland, for Respondent.

THE COURT.—The court is unable to concur in a judgment either for remanding the prisoner or discharging him, and, under article VI, section 4, of the constitution, and upon the authority of *Ex parte Oates*, 2 Cal. App. xiii, [83 Pac. 261], and *Ex parte Sauer*, 3 Cal. App. 237, [84 Pac. 995], the writ must be regarded as denied, and it is so ordered.

It is further ordered, that upon the return of the prisoner to the custody of the sheriff, or upon his resumption of the custody of the prisoner, the order for bail pending the proceedings be discharged, and, if money was deposited by him in lieu of bail, that it be returned to him by the clerk of the court.

[Civ. No. 860. Second Appellate District.—July 9, 1910.]

In the Matter of the Application of MILLS SING for Writ of Prohibition

WRIT OF PROHIBITION — PETITION UNDER JUVENILE COURT LAW — PRELIMINARY EXAMINATION — PREMATURE ORDER — SURPLUSAGE — QUESTION OF JURISDICTION.—Where a petition for a writ of prohibition to restrain a judge of the superior court from proceeding with a threatened preliminary examination of the petitioner charged with the violation of section 26 of the juvenile court law of 1909 [Stats. 1909, p. 213], shows that the judge indorsed an order of commitment on an affidavit of complaint, sworn to before a deputy county clerk, before any preliminary examination, it is evident that the order so indorsed was premature and without authority, and may be disregarded in determining the alleged want of jurisdiction of the judge to proceed with the preliminary examination as a committing magistrate.

ID.—EXCLUSIVE JURISDICTION OF MISDEMEANORS UNDER LOS ANGELES CHARTER — JURISDICTION UNDER JUVENILE COURT LAW.—Although

the Los Angeles charter confers exclusive jurisdiction of all misdemeanors committed within the city upon the police court and the city justice's court, yet such exclusive jurisdiction was divested as to all misdemeanors committed under the general juvenile court law, which is applicable to the superior court of Los Angeles county and all the superior courts in the state. It is immaterial, for the purposes of this decision, whether the jurisdiction of the superior court of Los Angeles county is exclusive or only concurrent as to misdemeanors under that law committed in the city of Los Angeles.

ID.—JUVENILE COURT LAW CONSTITUTIONAL.—The juvenile act violates no provision of the constitution. It is not a special act, affecting the punishment of offenses or the practice of courts of justice, but is a general law applicable to every county in the state, and to every superior court therein. While the constitution confers jurisdiction upon the superior court of all misdemeanors not otherwise provided by law, yet we have here a case where such jurisdiction is expressly conferred by a general law.

ID.—PRELIMINARY EXAMINATION REQUIRED FOR INFORMATION FOR MISDEMEANOR UNDER JUVENILE ACT.—The juvenile act making the offense charged a misdemeanor triable in the superior court, the provisions of the Penal Code applicable to information, and to a preliminary examination and commitment therefor, are conditions precedent to an information upon which only can the superior court proceed thereby to try one charged with a public offense, even though it be a misdemeanor of which it has jurisdiction.

ID.—DUTY OF JUDGE SITTING AS MAGISTRATE AS TO OATHS.—Although the complaint which institutes a criminal proceeding need not be verified, yet if properly verified, and containing positive evidence of facts tending to show guilt, it may be treated by the magistrate as a deposition; yet a superior judge sitting as a magistrate must administer all oaths as such, and has no right to call in a clerk or any other officer to administer oaths. He sits as a creature of the statute, with such powers only as are conferred upon justices of the peace or police judges.

ID.—COMPLAINT VERIFIED BEFORE DEPUTY CLERK INEFFECTIVE.—A complaint verified before a deputy county clerk is ineffective, either as a deposition upon a preliminary hearing, or as a deposition authorizing the issue of the warrant of arrest.

ID.—ARREST IN FACT—ILLEGAL RESTRAINT NOT INVOLVED IN PROHIBITION AGAINST PRELIMINARY EXAMINATION.—When the arrest has been actually made, and the petitioner for the writ of prohibition is before the judge for preliminary examination, no question of illegal restraint is involved in his petition, and the only question to be determined is whether the judge conducting such examination can be prohibited therefrom.

ID.—AUTHORITY OF JUDGE OF SUPERIOR COURT AS MAGISTRATE.—When the prisoner arrested is before the judge of a court having jurisdic-

tion as a magistrate to hold a preliminary examination, he may proceed to hold the same, and if a commitment issue, a foundation is laid for an information which cannot be set aside because the depositions were insufficient to warrant the arrest.

Id.—INSUFFICIENT PETITION FOR PROHIBITION.—*Held*, that the petition presents no facts sufficient to authorize this court to prohibit the preliminary examination of the defendant before the judge of the superior court sitting as a magistrate under the juvenile act.

APPLICATION for writ of prohibition to a judge of the Superior Court of Los Angeles County, sitting as a committing magistrate of the juvenile court.

The facts are stated in the opinion of the court.

George L. McKeeby, and Paul W. Schenck, for Petitioner.

Curtis D. Wilbur, George Beebe, and J. D. Fredericks, for Respondent.

THE COURT.—The petitioner represents that heretofore an affidavit was signed by one McLaughlin before a deputy county clerk of Los Angeles county charging petitioner with a violation of section 26 of the act known as the juvenile court law (Laws 1909, p. 213); that thereafter the probation officer of the juvenile court arrested petitioner and he was taken before respondent, a judge of the superior court of said county; that said judge then and there set the cause for preliminary hearing and examination before himself sitting as a committing magistrate, said examination to be had at 9 o'clock A. M. of the first day of June, 1910; that objection being made to the jurisdiction of respondent to conduct such preliminary examination, respondent continued the hearing thereof until the second day of June, at 9 o'clock A. M., for the purpose of hearing evidence and taking testimony; that notwithstanding such continuance, the respondent, on the first day of June, made and indorsed on the affidavit of complaint an order in conformity to section 872 of the Penal Code. It is averred that this order was made and entered by the court without hearing any evidence or taking any testimony. It is further averred that respondent threatens to hold a preliminary examination on the second day of June, that respondent is without jurisdiction to hold

such preliminary examination, the petitioner has no plain, speedy and adequate remedy in the usual course of law, and asks that the respondent be prohibited from sitting as a magistrate and conducting the preliminary examination of petitioner "upon the said instrument designated 'Complaint—Criminal' on file in said court."

Respondent demurs to the petition as being insufficient to authorize the issuance of the writ, and at the same time a motion was made to strike out of the application that portion thereof which contained the order indorsed upon the affidavit of complaint, for the reason that the same was indorsed thereon through inadvertence, and the record shows that such preliminary examination has not been held. We are of opinion that it is so evident from the petition that the order of commitment was prematurely entered, and without authority, that it need not be considered. The fact that the preliminary examination is threatened, and that the order of commitment could only be entered after such a preliminary examination, sufficiently demonstrates its premature character, and that its entry is not of serious consequence in the consideration of the questions presented upon this application.

It is contended by petitioner, the offense being a misdemeanor, that the police court and the city justice's court of Los Angeles city have exclusive jurisdiction. (Stats. 1901, p. 95.) The exclusive jurisdiction of misdemeanors committed within the city was by said act conferred upon such courts, but the juvenile court act (Stats. 1909, p. 213) divested such city courts of exclusive jurisdiction in misdemeanor cases of the class under consideration and conferred jurisdiction upon the superior court. Whether this jurisdiction so conferred upon the superior court is exclusive in such cases or concurrent is not material for the purposes of this decision.

It is next contended that the juvenile act violates those provisions of the constitution which prohibits special or local laws as affecting jurisdiction of justices of the peace, or the punishment of criminal offenses, or the practice of courts of justice. This criticism is fully answered by the statement that such act is general in its nature, applying to every county in the state and to every superior court therein. In addition to this, the constitution confers upon the superior

court jurisdiction in all misdemeanors not otherwise provided for by law; and here we have a case where such jurisdiction is expressly conferred by a general law.

Next it is claimed that the law contemplates no preliminary examinations in misdemeanor cases. The juvenile act making the offense under consideration triable in the superior court, section 888 of the Penal Code applies, which provides that all public offenses triable in the superior court must be prosecuted by indictment or information, except as to accusations for the removal of certain officers. Section 809 of the Penal Code directs the filing of an information after commitment by a magistrate, and section 950, Penal Code, specifies what such information must contain. It follows, therefore, that the preliminary examination and commitment are precedent conditions to the information upon which, and upon which only, can the superior court proceed to try one charged with a public offense, even though it be a misdemeanor.

It is finally contended that the court is without jurisdiction to conduct the preliminary examination threatened because the complaint was verified before a deputy county clerk, and not before the magistrate. The complaint which initiates a criminal proceeding need not be verified. (Pen. Code, sec. 806.) If verified, however, and containing positive evidence of facts tending to show guilt, the same may be treated by the magistrate as the deposition required by section 812 of the Penal Code. (*Ex parte Dimmig*, 74 Cal. 166, [15 Pac. 619].) Such depositions, however, must be taken by the magistrate, as must all preliminary evidence introduced tending to show the commission of an offense, and that there is reasonable ground to believe the defendant has committed it. A superior judge assuming the duties of a magistrate has no right to call in the clerk or any other officer to administer oaths. He sits as a creature of the statute, with such powers only as are conferred upon justices of the peace or police judges. (*People v. Cohen*, 118 Cal. 78, [50 Pac. 20].) It must be held, therefore, that the complaint verified before a deputy clerk cannot be used as a deposition upon a preliminary hearing; nor was it a deposition authorizing the issue of the warrant of arrest. The arrest, however, was made, and the petitioner is before the court for examination. No question of illegal restraint is here involved. We are

called upon to determine only whether, having petitioner before him under a complaint in writing, the respondent can be prohibited from conducting the preliminary examination. The complaint and the depositions are only intended as a basis for the warrant of arrest. When the arrest has been actually made and the prisoner is before a court having jurisdiction as a magistrate to hold a preliminary examination, such magistrate may proceed to a preliminary examination, and, if commitment issue, a foundation is laid for the filing of an information, and the same cannot be set aside because the depositions were insufficient to warrant the arrest. (*People v. Lee Look*, 143 Cal. 220, [76 Pac. 228].)

We are of opinion, therefore, that the petition herein does not state facts sufficient to authorize the issuance of the writ of prohibition.

Writ denied.

[Crim. No. 177. Second Appellate District.—July 9, 1910.]

In the Matter of the Application of W. J. DANFORD for
a Writ of Habeas Corpus.

HABEAS CORPUS—CRIMINAL JURISDICTION—ERRORS—REVIEW UPON APPEAL.—Where a petitioner for a writ of *habeas corpus* has been held to answer in the superior court upon a criminal charge of which it has jurisdiction, and the affidavit of complaint and commitment and information are sufficient, all subsequent irregularities or errors in the exercise of jurisdiction can only be reviewed upon appeal, and *habeas corpus* will not lie on account thereof.

ID.—STRIKING OUT SECOND OFFENSE NOT EMBODIED IN COMPLAINT—JURISDICTION—SURPLUSAGE—ELECTION.—The striking out from the information of an offense not embodied in the complaint did not go to the jurisdiction for the purpose of the petition for the writ of *habeas corpus*. The court had authority to strike it out as surplusage, and the order granting the motion had the effect of an election to proceed only upon the offense properly charged.

ID.—RULE AS TO SUFFICIENCY OF INDICTMENT OR INFORMATION.—Where an indictment or information purports or attempts to state an offense of a kind of which the superior court has jurisdiction, the question whether the facts charged are sufficient to constitute an offense cannot be examined into upon writ of *habeas corpus*. Such inquiry is only permissible where there is for review a proceeding in an inferior court.

Id.—REVIEW OF PROCEEDING IN COURT OF GENERAL JURISDICTION.—Where this court is called upon to review upon writ of *habeas corpus* a proceeding in a court of general jurisdiction, a rule which would apply to an indictment therein would apply with equal force to an information filed in such court.

APPLICATION for writ of *habeas corpus*.

The facts are stated in the opinion of the court.

W. J. Danford, Petitioner in *pro. per.*

THE COURT.—An affidavit of complaint was filed before a justice of the peace charging defendant with a violation of section 474 of the Penal Code. This affidavit of complaint is sufficient in every respect. The justice of the peace, upon preliminary examination, held the defendant to answer. Thereafter, the district attorney filed an information charging defendant with the same offense specified in the affidavit of complaint, and, in addition thereto, included in said information a second and different offense than that for which defendant had been held to answer. Defendant moved to set aside the information because two separate and distinct offenses were charged, and also filed a demurrer to the information on the grounds, first, of the uncertainty thereof, and, second, that the information included an offense for the commission of which defendant had not been legally committed by a magistrate.

It is alleged in the petition for the writ that the court granted leave to the district attorney to strike out of the information the second offense, which was the one not embodied in the affidavit of complaint, and overruled the demurrer to the information. It is contended by petitioner that this action of the district attorney in striking out the second offense deprived the court of jurisdiction to hear and determine the action. Assuming that this second offense was included in the information without warrant, upon such theory the same was surplusage and was properly stricken from the information. The effect of striking the same from the information was an election to proceed only as to the offense properly charged. When a sufficient information charging the offense for which he stood committed remained, the accused could in no sense be injured by the action of

the district attorney or the court in striking out such surplusage. It is alleged that subsequently the defendant was tried and convicted of the first offense. It will be assumed, nothing to the contrary appearing in the petition or exhibits attached thereto, that his plea was entered after the hearing of the motion and the demurrer. The affidavit of complaint being sufficient, no reason is apparent why the rule laid down in *Ex parte Ruef*, 150 Cal. 665, [89 Pac. 605], should not be applied, which is that, "where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on *habeas corpus*." Such inquiry is only permissible where there is for review a proceeding in an inferior court. (*Ex parte Greenall*, 153 Cal. 770, [96 Pac. 804].) Here we are called upon to review a proceeding in a court of general jurisdiction, and a rule which would apply to an indictment should apply with equal force to an information filed in such court. In our opinion, therefore, the petitioner having been regularly held to answer, the affidavit of complaint and commitment being sufficient, and the information purporting to state an offense of a kind of which the court assuming to proceed has jurisdiction, that all subsequent irregularities or errors, if any occurred in the course of the proceedings, are matters for review upon appeal and *habeas corpus* will not lie on account thereof.

Writ denied.

[Crim. No. 259. First Appellate District.—July 11, 1910.]

THE PEOPLE, Respondent, v. THOMAS ELLIOT SAUNDERS, Appellant.

CRIMINAL LAW—ARSON—SUPPORT OF VERDICT.—It is held that the evidence is sufficient to sustain the verdict of conviction of the defendant of the crime of arson in the first degree as charged in the information.

ID.—GENERAL RULE AS TO REVIEW OF VERDICT—QUESTIONS OF LAW AND OF FACT.—In criminal cases, generally, this court can pass only upon questions of law, and it is only when there is an entire lack of evidence to support the verdict that a question of law is presented. If

the evidence bearing against the defendant, considered by itself, without regard to conflicting evidence, tends to support the verdict, the question ceases to be one of law, of which this court alone has jurisdiction, and becomes one of fact upon which the decision of the jury and of the trial court is final and conclusive.

Id.—CORPUS DELICTI—BURNING INSUFFICIENT—ADMISSION OF DEFENDANT—PROOF OF DISTINCT FIRES—ACCIDENT REBUTTED.—The mere proof of the burning of a building does not establish the *corpus delicti* of arson; and the admissions and statements of the defendant are not sufficient, of themselves, to justify a conviction without proof of the *corpus delicti*. But where the physical condition of the premises showed that three separate and distinct fires had been started, and it further appeared to be improbable that the fire was the result of accident, the *corpus delicti* of arson was sufficiently established.

Id.—ORDER OF PROOF—DEFENDANT'S ADMISSIONS—DISCRETION OF COURT. The order of proof is in the discretion of the court. Though most of the admissions of defendant were proved subsequent to the proof of the *corpus delicti*; if any one or more of them were proved before that proof was made, that fact will not justify a reversal of the judgment.

Id.—EXPERT EVIDENCE STRICKEN OUT—SUBSEQUENT STATEMENT OF FACTS PROPERLY ADMITTED.—Where the expert evidence of the fire marshal as to three distinct fires, admitted over an objection, was stricken out, the court did not err in permitting him to state the facts observed by him which showed such distinct fires.

Id.—EVIDENCE—REMARK OF DEFENDANT TO POLICE OFFICER ARRESTING HIM—UNTENABLE OBJECTION—DEGRADING CHARACTER OF REMARK.—Where defendant was charged with burning part of a hospital from which he had been discharged, evidence of a remark made by him to the police officer arresting him speaking disparagingly of attaches of the hospital, and stating that he would get even with the hospital authorities, was not objectionable on the ground that it would tend to degrade him.

Id.—PRIVILEGED QUESTION CONFINED TO EXAMINATION OF WITNESS—REMARK TO OFFICER NOT PRIVILEGED.—It is only when the answer to a question asked of a witness would tend to degrade him that the answer is privileged. But where, as here, no question was asked of defendant as a witness, but the proof was confined to a voluntary statement made by him to the police officer, such statement was not privileged on that ground.

Id.—REMARK OF PROSECUTING ATTORNEY — "CHARACTER OF DEFENDANT BEING DEGRADED."—The remark of the prosecuting attorney where the evidence of the police officer was objected to as "tending to degrade the defendant," that "the character of the defendant is being degraded as we go along, that is our object," while it would better have been left unsaid, is of too trivial a nature to require

a reversal. What he was probably understood to mean was that the defendant was being degraded by the evidence tending to prove him guilty of the crime charged.

ID.—EXAMINATION OF WITNESSES BY COURT—PERTINENT QUESTIONS—ABSENCE OF LEANING AGAINST DEFENDANT.—The fact that the court took a prominent part in the examination of the witnesses does not indicate any misconduct on his part, where his questions were not only pertinent, but showed no leaning against the defendant.

ID.—NEWLY DISCOVERED EVIDENCE OF INSANITY WHEN CRIME WAS COMMITTED—DISCRETION OF COURT.—Where the defendant moved for a new trial on newly discovered evidence that he was insane at the time of the commission of the act charged, it cannot be said that the court abused its discretion in the matter of refusing continuances to secure such proof, or in denying the motion for a new trial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

Clarence G. Atwood, and Charles A. Strong, for Appellant.

U. S. Webb, Attorney General, for Respondent.

KERRIGAN, J.—The defendant was accused by information of the crime of arson of the first degree. He was tried and convicted as charged. He moved for a new trial, which was denied, and he was thereupon sentenced to imprisonment in the state prison for the term of twenty years. This appeal is prosecuted from the judgment and from the order denying defendant's motion for a new trial.

Defendant contends that the evidence is insufficient to support the verdict.

The record is long, but the facts, very briefly, are as follows: The defendant had been in the employ of the St. Luke's Hospital as a porter for about two weeks when, on November 16, 1909, being under the influence of liquor, and being moreover generally unsatisfactory to the management of the hospital, he was discharged by the matron. Although discharged at about 5 o'clock in the afternoon of that day and repeatedly requested thereafter to leave the premises, he did not do so, and was arrested and removed by police officers at about 12

o'clock that night. On the way to the police station he abused the doctors and nurses of the hospital, and told the officer in charge of the patrol wagon that he would "get even." The next day, upon being released from custody, he went back to the hospital, and after being ordered away he called at the offices of two of the San Francisco daily morning newspapers and endeavored to have them publish a statement that the dead were being robbed at St. Luke's Hospital. On the way to these offices he met Rev. Dr. Shields, head of one of the departments of the hospital, and said, "I am sorry to have to do it, but you will see it all in the papers in the morning." His story was refused publication. He returned to the hospital that evening at about 11:30. The police department was again appealed to, but police officers did not arrive at the hospital until somewhere between 1 and 2 o'clock, whereupon they searched the premises but did not find the defendant. At 3:45 A. M. of November 18, 1909, a fire occurred in the basement of that wing of the hospital called the Mills building, in which eighteen patients were at that time confined, who all, however, fortunately escaped unharmed. Defendant was seen by several witnesses both just before and just after the fire in the neighborhood of the hospital. Yet in a letter to one of the nurses, and in a statement to the fire marshal in the presence of several police officers, he denied that he was in that vicinity at either of those times. In his statement to the fire marshal he attempted to account for his whereabouts on the night of the 17th of November, but we think the jury were fully justified in disbelieving him. The condition of the basement of the Mills building shows that the fire in all probability was of incendiary origin.

We think the evidence is sufficient to sustain the verdict of the jury. In criminal cases this court can pass only upon questions of law, and it is only where there is in effect an entire lack of evidence to support a verdict that a question of law is presented. The rule is stated thus in *People v. Emerson*, 130 Cal. 563, [62 Pac. 1069]: If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, tends to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact, upon which the decision of the jury and the trial court is final and conclusive.

It is true, as contended by defendant, that the mere proof of the destruction of a building by fire is not enough to establish the *corpus delicti*, and the defendant's extrajudicial statements and admissions are not sufficient of themselves to sustain a judgment of conviction for arson (*People v. Simonson*, 107 Cal. 345, [40 Pac. 440]). But here the physical condition of the premises showed that three separate and distinct fires had been started; and this evidence, taken in connection with other evidence tending to show the improbability of the fire being the result of accident, was sufficient to show that the crime of arson had been committed.

The extrajudicial statements of the defendant were adduced after the *corpus delicti* was disclosed; and even if they had been admitted in evidence before the *corpus delicti* was established (as the defendant claims was the case), still no serious question would be presented. The usual order of proof would have been departed from; but the order of proof is in the discretion of the trial court, and while the *corpus delicti* is ordinarily the first point to which the evidence should be directed, nevertheless the admission in evidence of a declaration by the defendant before such proof is made will not warrant a reversal of the judgment (*People v. Jones*, 31 Cal. 567; *People v. Jones*, 123 Cal. 65, [55 Pac. 698]).

Fire Marshal Towe gave his opinion as an expert that there had originally been three different and separate set fires which had formed into a small conflagration. This testimony went in over the objection of the defendant, and later upon his motion it was stricken from the record, and the jury was instructed to disregard it. Subsequently the witness stated facts which showed that the fire had three different places of origin. The assertion of the defendant that the court's action in this regard was error is entirely without merit.

On the way to the police station on the occasion of his first arrest the defendant made a remark to the police officer in charge of the patrol wagon in disparagement of the women attaches of the hospital, and that he would get even with the hospital authorities. The question which elicited this testimony was objected to upon general grounds, and also for the reason that it would tend to degrade the defendant. The deputy district attorney in reply said, "The character of the defendant is being degraded as we go along, that is our ob-

ject." When the question was propounded the court was unable to anticipate the nature of the answer, and as no motion was made to strike it out, and part of the answer being admissible, the defendant cannot be heard to complain. Moreover, if the question called for competent and material testimony, it was no objection to it that it might tend to degrade the character of the defendant. It is only when the answer to a material question will tend to degrade the character of the witness, that he is excused from answering it (Code Civ. Proc., sec. 2065), and the question here was addressed to the police officer and not to the defendant.

Coming to the observation of the prosecuting officer, and conceding that it would have been better left unsaid, nevertheless it is too trivial a matter to be considered as a ground for reversal. Besides, what the district attorney meant, and what he was probably understood to mean, was that the defendant was being degraded by the evidence introduced tending to prove him guilty of the crime charged.

Defendant claims that "throughout the case the court took a very prominent part in the examination of the witnesses," at times taking the witnesses "out of the hands of the prosecuting attorney and conducting the examination." A reading of the record discloses that whenever the court examined witnesses the questions asked were not only pertinent but they showed no leaning against the defendant. Therefore there is no occasion here, as there was in the case of *People v. Bowers*, 79 Cal. 415, [21 Pac. 752], for criticising the conduct of the trial court.

The defendant moved for a new trial upon the ground that subsequent to the trial he had discovered evidence showing that he was insane at the time of the commission of the act charged. At the hearing of the motion five affidavits in support thereof were read and filed, whereupon defendant's counsel requested a continuance of the pronouncing of judgment to enable them to get affidavits from Denver concerning defendant's family record and of his confinement in an insane asylum in the state of Colorado. The court had granted several continuances of this matter, and refused this request, and also made its order denying the motion for a new trial. We cannot say that the court in either matter abused its discretion.

Having thus concluded that there is no error prejudicial to the defendant in the record, we deem it unnecessary to discuss the point made by the attorney general that no proper appeal has been perfected.

The judgment and order are affirmed.

Cooper, P. J., and Hall, J., concurred.

[Crim. No. 251. First Appellate District.—July 11, 1910.]

THE PEOPLE, Respondent, v. J. J. ARBERRY, Appellant.

CRIMINAL LAW—ATTEMPT TO OBTAIN MONEY BY FALSE PRETENSES—

SUPPORT OF VERDICT.—Upon appeal from a judgment of conviction of the crime of attempting to obtain money under false pretenses, and from an order denying a new trial, the testimony for the prosecution must be presumed to be true, and the facts proved are sufficient to support the verdict of guilty.

ID.—FALSE PRETENSES BY ADVERTISING PHYSICIAN—FATAL HEART DISEASE—SUBSTANTIAL CONFORMITY OF INFORMATION TO PRELIMINARY COMPLAINT.—Where the false pretenses were made by an advertising physician that a young man had fatal heart disease, in an attempt to obtain money from him and his aunt, in the sum of \$200 to cure the same, it is held that the information charging the same was in substantial conformity to the preliminary complaint before the committing magistrate.

ID.—EXACT CONFORMITY OF INFORMATION TO COMPLAINT NOT ESSENTIAL. Where the committing magistrate held the defendant to answer for the crime of attempting to obtain money by false pretenses, indorsed upon and referred to in the complaint, and the information charges the defendant with the same offense, the statute is sufficiently complied with. It is not contemplated that the information should contain a statement of the crime in the exact language or word for word the same as stated in the complaint filed before the committing magistrate.

ID.—GENERAL STATEMENT OF OFFENSE IN ORDER OF COMMITMENT.—

Under section 872 of the Penal Code, the order of commitment is only required to state generally the nature of the offense with which the defendant is charged; and where the order of commitment here made stated generally the crime of obtaining money by false pretenses, and stated that there is sufficient cause to believe the defendant guilty thereof, the order sufficiently complied with the statute.

ID.—DEMURRER SUSTAINED TO FIRST INFORMATION—TIME FOR NEW INFORMATION—REASONABLE TIME—EXTENSION—PRESENCE OF DE-

DEFENDANT.—Where a demurrer was sustained to a first information, under section 1008 of the Penal Code, which provides for filing a new information, in the discretion of the court, but fixes no time therefor, the court may allow a reasonable time in which to file it. Where ten days were allowed in the presence of the defendant, and an extension of five additional days were allowed in his presumed presence, the contention of the defendant that the new information was invalid because not filed within the ten days is not sustainable. The defendant was not required to be present when the information was filed; and it would seem that an order extending time to file it is not a proceeding requiring his presence.

ID.—NEW INFORMATION SUFFICIENT—DEMURRER PROPERLY OVERRULED.—

The new information states facts sufficient to constitute a public offense, and a demurrer thereto was properly overruled.

ID.—STATEMENT OF VALVULAR HEART DISEASE ONE OF FACT.—The de-

fendant's statement that the young man was suffering from a valvular disease of the heart was a statement of fact. It was not given as an opinion, but it was a statement voluntarily made by defendant to a person from the country ignorant of medicine and disease, and who had the right to rely upon a physician's honor and integrity. It is not pretended that the statement is true and it was made contemporaneously with an attempt to obtain an additional sum of \$200 from his aunt, who had recently paid the physician the same sum for a previous pretended cure of the same young man for an abscess of the prostate gland.

ID.—ESTOPPEL OF DEFENDANT—ABSENCE OF MONEY PREVENTING CRIME.

The defendant is estopped to say that the young man's aunt had no money, so that it would have been impossible to have accomplished the contemplated crime.

ID.—ATTEMPT AND USE OF MEANS SUFFICIENT.—It is sufficient that de-

fendant made the attempt to get the money, and used means apparently adapted to the end in view, although circumstances independent of defendant's will left the crime uncommitted. He made a false statement to the young man's aunt as to an ailment that had no existence, that he could cure it, that it was worth \$300 to cure it, but that he agreed to cure it for \$200.

ID.—DISTINCTION AS TO RESPONSIBILITY BETWEEN HONEST AND DIS-

HONEST PHYSICIANS.—There is little danger of an honorable, upright physician being held to criminal account for a mistaken diagnosis, but where a dishonest physician or quack, who seeks opportunities to thrive and become wealthy off the ignorance and stupidity of his patients, has made a willfully false statement as to a mortal disease, solely with the view of obtaining money from the victim or his relatives, the law should deal severely with such physician. The fact that he is a licensed physician will not be allowed as a cloak to shield him from all responsibility for statements

willfully made with the sordid view of obtaining the money of the unwary.

ID.—LETTERS SENT BY DEFENDANT ADMISSIBLE.—Letters sent by the defendant to the young man's aunt, which sufficiently connected the defendant therewith, and with the demands and statements therein made, were properly admitted in evidence.

ID.—EVIDENCE OF PREVIOUS CRIME ADMISSIBLE—QUALIFIED PURPOSES.—Evidence of the previously consummated crime of obtaining the money of the young man's aunt under the false pretense that he had an abscess of the prostate gland was admissible as a prior transaction between the same parties, not for the purpose of showing another and distinct crime, but to show the intent of the defendant in representing to the aunt that her nephew had valvular disease of the heart, and as bearing on the question whether or not his statement was made with the intent of procuring money and in violation of law.

ID.—INSTRUCTIONS—PROPER CHARGE AND REFUSAL OF REQUESTS.—It was not error to refuse requested instructions covered by the charge. It is held that there was no substantial error in the charge, or in the refusal of any requests, but that the court fairly and fully stated the substance of the law applicable to the evidence and the issue to be determined by the jury.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

Carroll Cook, and Lloyd S. Ackerman, for Appellant.

U. S. Webb, Attorney General, and W. W. Kaufman, for Respondent.

COOPER, P. J.—The defendant prosecutes this appeal from an order denying his motion for a new trial, and from a judgment convicting him of the crime of an attempt to obtain money by false pretenses. There is evidence which, if true (and we must so presume upon this appeal in view of the finding of the jury), shows the following facts:

Ulysses Muscio, a young man about twenty-one years of age, resided at Edna, in the county of San Luis Obispo. He had not been very well, and was troubled with pains in his back, and either needed or imagined that he needed the advice and

aid of a physician. He had read in the San Francisco "Examiner" the advertisement of "Dr. Taylor & Co. at 721 Market street," which advertisement stated the ability and skill of the doctors in charge, and their undertaking specially to cure all diseases of men and youths. He came to San Francisco on July 18, 1909, and on the following day, with the advertisement in his hands, he went to "Dr. Taylor & Co., 721 Market street," and asked to see Dr. Taylor. The defendant appeared and stated to Muscio that he was Dr. Taylor, and at all times thereafter was addressed by Muscio as Dr. Taylor. Muscio was taken into a consultation room and examined by defendant, who by manipulation of the prostate gland obtained therefrom a milky fluid—an easy thing for a physician to do—which he showed to Muscio, and without any examination of it, microscopic or otherwise, informed him that it was pus from an abscess of the prostate gland, and demanded of Muscio \$300 to cure him. Muscio having only \$10 with him, defendant took that, and agreed that for \$200 more he would cure him. At defendant's suggestion and dictation Muscio wrote to his aunt, Mary Tomasini, a letter as follows: "Dear aunt,—I am sick and won't be home until the latter part of the week, and I need \$200. Please send it to me at once to this address." This letter was written on the letter-head of "Dr. Taylor & Co." On July 22d a letter was received from the aunt, addressed to Muscio, care of "Dr. Taylor & Co.," which letter was opened by defendant and then handed back to Muscio. It contained a check for \$200, which Muscio indorsed and handed to defendant, and which was paid. Defendant then handed Muscio a receipt for \$210, signed "Dr. Taylor & Co.," guaranteeing a cure of the alleged abscess of the prostate gland. On the same day a letter was mailed in San Francisco, on the letter-head of "Dr. Taylor & Co.," addressed to the aunt, stating that in reply to her letter of July 22d Muscio was suffering from an abscess of the prostate gland, but that he was doing very nicely "under our care," and that he could return home in a few days. On the following day, and after the receipt of the \$210, upon the same letter-head, signed in typewriting and dated July 23d, there was deposited in the United States mail at San Francisco, and received by the aunt, Mrs. Tomasini, the following letter: "Since writing you yesterday in regard to your nephew

Ulysses Muscio, we have discovered a serious complication, and as he is very nervous we deem it best not to say anything to him, at least until we have seen you, and would advise you to come to San Francisco at once and call at this office before seeing him, as we desire to have a personal interview with you as soon as possible. You need not be alarmed however, as there is no immediate danger, but trust you will call as advised." After receiving this letter the aunt came to San Francisco, and was met by a relative of hers, and together they immediately went, accompanied by Muscio, to consult Dr. Spencer, who, after an examination, stated that Muscio did not have, and had not had, an abscess of the prostate gland. Thereafter the aunt, in company with her relative, went to the office of "Dr. Taylor & Co.," and asked for Dr. Taylor, and in response thereto they were presented to defendant as being Dr. Taylor, who informed them that he was Dr. Taylor. They then went into a private office, and in answer to questions the defendant said that he had written the letter in regard to the serious complications he had discovered in Muscio's case. Defendant then stated to the aunt, in the presence and hearing of Crespi, that Muscio had a valvular disease of the heart, that he might drop dead at any moment, but that he, defendant, could cure him, that he would have to have the care of Muscio for a week or ten days and inject serum, which he said was very expensive, but that at the end of that time Muscio could go home to his aunt and take medicines which he would prescribe for him. Defendant stated that it was worth \$300 to cure Muscio of the valvular disease of the heart, but that he had been paid \$200 for curing the abscess of the prostate gland, and that he would cure him of the valvular disease of the heart for the additional sum of \$200. This sum was requested by the defendant from the aunt after his statement that Muscio had a valvular disease of the heart and that he could cure him. The aunt and Crespi then left defendant's office under the pretense of getting the money, but never returned. Muscio was afterward examined by Dr. Spencer, Dr. Lartigan and Dr. Schmall; and they found not only that he had never had an abscess of the prostate gland, but that his heart was normal and that he had no valvular trouble of that organ. The testimony of these physicians, which is not con-

tradicted, is that a valvular disease of the heart can be determined with absolute certainty.

This brings us to the discussion of the errors complained of by defendant, and which he claims are sufficient to justify a reversal of the case.

The defendant claims that the court erred in denying his motion to dismiss the information, which was made upon the ground that prior to the filing thereof the defendant had not been legally committed by a magistrate for the offense charged in the information. It is stated in his brief that by taking the complaint filed before the committing magistrate and the commitment and reading them together, "it will be seen that the new information filed does not charge the defendant with the same crime for which he was held to answer by the committing magistrate." It is not stated in the brief as to the respects wherein the crime charged in the information differs from the crime for which defendant was held to answer, and upon the examination we have been able to give we can find none. The complaint before the committing magistrate charged the defendant with the crime of attempting to obtain money by false and fraudulent pretenses, by falsely and willfully representing to Mary Tomasini that Muscio "had an affection and disease of the heart of a serious nature, to wit, that said Ulysses Muscio had valvular disease of the heart, and that a valve of the heart of said Ulysses Muscio was in a diseased condition, and did further pretend and represent to the said Mary Tomasini that the said affection or disease of the heart of said Ulysses Muscio did endanger the life of said Ulysses Muscio, and that because of the said affection and disease of the heart of said Ulysses Muscio he, said Ulysses Muscio, was apt to drop dead at any time, and that the said affection or disease of the heart of said Ulysses Muscio required immediate medical attention, and that said affection or disease of the heart he, the said John J. Arberry (whose real name is unknown to this complainant), could and would cure for the price or sum of two hundred dollars, and no less." At the conclusion of the testimony taken before the committing magistrate he made and indorsed on the complaint the following order, to wit: "I find that the offense as charged in the complaint, felony, to wit, attempt to obtain money by false pretenses, has been committed, and that there is sufficient

cause to believe the defendant John J. Arberry guilty thereof, and order that he be held to answer for the charge before the honorable superior court of the City and County of San Francisco."

The amended information charged the defendant with a felony, to wit, attempt to obtain money by false pretenses, by the defendant falsely representing and pretending that Muscio "had an affection and disease of the heart of a serious nature, to wit, that said Ulysses Muscio had valvular disease of the heart, that a valve of the heart of said Ulysses Muscio was in a diseased condition, and did further pretend and represent to the said Mary Tomasini that the said affection or disease of the heart of said Ulysses Muscio was of such nature and character that said disease did endanger the life of said Ulysses Muscio, and further that because of the said nature and character of said disease and affection of the heart of said Ulysses Muscio, he the said Ulysses Muscio was apt to drop dead at any time, and further that the said affection or disease of the heart of said Ulysses Muscio was of such a nature that the same required immediate medical attention, and did then and there demand for such medical attention the price or sum of two hundred dollars in gold coin of the United States of America, and did then and there request the said Mary Tomasini to pay to him the said sum of Two hundred dollars in gold coin of the United States of America, for the purpose of effecting a cure of said alleged affection or disease of the heart of said Ulysses Muscio."

The committing magistrate held the defendant for the crime of attempting to obtain money by false pretenses, and the information charges the defendant with the same crime. This is a sufficient compliance with the statute. In our opinion, it was never contemplated that the information should contain a statement of the crime in the exact language or word for word the same as stated in the complaint filed before the committing magistrate. The code provides (Pen. Code, sec. 872) that if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, he must make or indorse on the complaint an order to the effect: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof)

has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer to the same." The order herein made stated generally the nature of the offense and sufficiently complied with the statute.

The demurrer of defendant was sustained to the first information. The code (Pen. Code, sec. 1008) provides that when a demurrer is sustained to an indictment or information it is a bar to another prosecution for the same offense "unless the court being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the cause to be submitted to another or the same grand jury, or directs a new information to be filed." The court upon sustaining the demurrer, being of the opinion that the objection on which the demurrer was allowed could be avoided, directed that a new information be filed. The order made by the court, as shown by the reporter's notes, did not specify any time within which the new information should be filed; but the clerk's minutes show that the district attorney was given ten days from the date of the order in which to file such information. It is now contended that the new information was not filed within the ten days but within fifteen days, and that the court made an order in the absence of defendant and his counsel allowing the district attorney the additional five days; that such order was void, and hence the court lost jurisdiction.

The section last quoted is silent as to the time in which the new information is to be filed; and it would seem that under the law the district attorney would have a reasonable time within which to file such new information. It is not contended that it was not filed within a reasonable time. The court directed the district attorney to file it. Such order was made in the presence of the defendant, and the additional time was not material unless the court had made an order extending the time beyond reasonable limits. However, counsel has failed to call our attention to any testimony or record showing that defendant was not present when the order was made extending the time. The clerk's minutes show that the defendant was present accompanied by his counsel, and there is nothing that we have been able to find in the reporter's notes to the contrary. Not only this, but there is nothing in the statute re-

quiring a defendant to be present when an information or indictment is filed. If the filing of an indictment against a defendant is not a proceeding during his absence, it is difficult to see how the giving of an order extending time to file it is such proceeding.

Nor did the court err in overruling the demurrer to the amended information. It states facts sufficient to constitute a public offense. The statement that the young man was suffering from a valvular disease of the heart was a statement of a fact. It was not given as an opinion, but it was a statement voluntarily made by defendant to a person from the country, ignorant of medicine and diseases, and who had the right to rely upon a physician's honor and integrity. It is not pretended that the statement is true, and it was made just at the time and contemporaneous with the attempt to get an additional \$200 from the aunt. It does not lie in the mouth of defendant to say that Mrs. Tomasini had no money, so that it would have been impossible for him to have accomplished the contemplated crime. He made the attempt to get the money. He made a false statement as to an ailment that had no existence; and not only this, but stated that he could cure it. From his statement it was worth \$300 to cure an ailment that, as a fact, had no existence, and he agreed to cure such alleged ailment for \$200. A person who has attempted to pick the pocket of another would not be allowed to defend himself by proving that there was nothing in the pocket which he attempted to pick. So a robber, who holds up and attempts to rob the United States mail, would not be allowed to call postoffice officials or others to prove that there was nothing of value in the mail, and hence that no robbery could have been committed. It is sufficient that the means was apparently adapted to the end in view, although circumstances independent of the will of defendant left the crime uncommitted. The profession of medicine is an honorable and useful one, and the skillful, careful, honest physician who devotes his time—often his days and nights—to the relief of suffering humanity is a blessing to the community in which he resides. But while this is true, there is probably no profession or calling which affords greater opportunities for the dishonest quack to thrive and become wealthy off the ignorance and stupidity of his patients. There is little danger of an honorable, upright phy-

sician being held to criminal account for a mistaken diagnosis; but where a dishonest physician has made a willfully false statement as to a mortal disease solely with the view of obtaining money from the victim, the law should deal severely with such physician.

We do not mean to even intimate by what has been said that the law will hold a physician liable criminally for a statement honestly, but mistakenly, made as to his professional judgment in regard to a disease. But the fact that one is a licensed physician will not be allowed as a cloak to shield him from all responsibility for statements willfully made with the sordid view of obtaining the money of the unwary.

The letters sent to Mrs. Tomasini signed in typewriting "Dr. Taylor & Co." were properly admitted in evidence. The evidence sufficiently connected the defendant with them and with the demands and statements therein made.

The court did not commit error in allowing evidence as to the prior statement that Muscio had an abscess of the prostate gland, and the fact that the defendant received \$200 to cure that. The transaction was with the same parties, from the same "Dr. Taylor & Co.," the defendant in each case representing himself to be Dr. Taylor, and each transaction was with the aunt of Muscio. It was admitted, not for the purpose of showing another and distinct crime, but to show the intent of the defendant in making the representations to the aunt that Muscio had valvular disease of the heart, and the question as to whether or not his statement was made with the intent of procuring money and in violation of the law.

The defendant complains of the refusal of the court to give the following instruction: "You are instructed that no matter how strong may be the probability in favor of the hypothesis of guilt, if it is nothing more than a probability, the prosecution fails and the defendant must be acquitted." The court elsewhere gave the substance of the instruction. In fact, the very next instruction given at defendant's request was the following: "You are instructed that suspicion, no matter how strong it may be, cannot justify you in convicting the defendant of the crime charged. The law does not permit a conviction of a crime upon suspicion, be it ever so strong." And the court elsewhere instructed the jury that "Mere probabilities are not sufficient to warrant a conviction."

Complaint is further made that the court refused to give an instruction asked by the defendant to the effect that it is not sufficient that the facts proved coincide with, account for, and render probable the hypothesis of guilt, but they must exclude to a moral certainty and beyond all reasonable doubt every other hypothesis but the single one of guilt. The instruction requested related to a statement of the law in connection with circumstantial evidence; and if it was material in the case, we are of the opinion that it was substantially given elsewhere. The court in other instructions stated to the jury: "The guilt of the accused must be proved and established beyond all reasonable doubt," and "Neither a mere preponderance or any weight of preponderant evidence is sufficient for the purpose of conviction"; and finally, "It is not sufficient that the circumstances proved coincide with, account for and therefore render probable the hypothesis sought to be established by the prosecution; but they must exclude beyond all reasonable doubt to a moral certainty every other reasonable hypothesis but the single one of guilt. Should they fail to so establish defendant's guilt in a single particular, it is the duty of the jury to render a verdict of not guilty."

Other errors are claimed in regard to the giving or the refusal to give instructions, but to discuss them in detail would prolong this opinion to an unnecessary length. It is sufficient to say that we have examined the instructions given and the instruction refused, and we find no substantial error in the giving of any instruction or the refusal to give any. The court fairly and fully stated the substance of the law applicable to the evidence and the issue to be determined by the jury. We find no error in the record that would justify us in reversing a case that appears to have been fairly tried.

The judgment and order are affirmed.

Kerrigan, J., and Hall, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 8, 1910.

[Civ. No. 723. Third Appellate District.—July 13, 1910.]

PETER D. BARNES, Petitioner, v. BOARD OF SUPERVISORS OF COLUSA COUNTY et al., Members of Said Board, Respondents.

PROTECTION DISTRICT—PETITION FOR FORMATION—SIGNATURES OF PROPERTY OWNERS—PRESUMPTION—BURDEN UPON PETITIONER FOR WRIT OF REVIEW.—Upon a petition for a writ of review to annul a proceeding for the formation of a protection district under the act of March 27, 1895, for the improvement and rectification of the channels of innavigable streams, it must be presumed that, when the petition for the formation of the district was filed, the board of supervisors required and received evidence as to the genuineness of the signatures thereto, and that the signers were "property holders of the district"; and the burden is upon the petitioner for the writ of review to overcome the presumption that the supervisors performed their duty in that regard, and to overcome their finding to that effect, and to show that the board of supervisors had no jurisdiction to form the district; and that presumption and finding must prevail, in the absence of any evidence to the contrary.

Id.—ORDER OF PROCEEDING UNDER STATUTE.—To require proof as to the signatures of property owners before the board passes a resolution of intention to organize the district is the natural order of procedure contemplated by the statute; and no reason appears why such evidence should be repeated at the time of hearing of objections of the property owners, if any, to such work or improvement, where no issue as to the number of property owners signing the petition is raised at that time.

Id.—OBJECTIONS TO WORK OR IMPROVEMENT OR EXTENT OF DISTRICT—HEARING BY BOARD.—Under section 3 of the statute, "Any person interested objecting to such work or improvement, or to the extent of the district of lands to be affected or benefited by such work or improvement, and to be assessed to pay the costs and expenses thereof, may make written objections to the same within ten days after the expiration of the time of the publication of said notice," and thereafter such objection shall be heard by said board.

Id.—OBJECTIONS BY PETITIONER FOR WRIT OF REVIEW—ADVERSE FINDING BY BOARD.—Where the petitioner for the writ of review specified his objections to such improvement and to the extent of the district, on the ground that the work as contemplated would injure his lands, specifying in what respect, and that the formation of the district would burden the taxpayers, and evidence was heard as to the objections specified, and the finding was against the petitioner, the board was not required at that time to do anything more, assuming that its prior proceedings were regular.

ID.—PROOF OF PUBLICATION OF NOTICE—ADJUDICATION BY BOARD—ORDER ESTABLISHING DISTRICT—SUBSEQUENT FILING OF AFFIDAVIT IMMATERIAL.—Where the record of the board of supervisors containing the order establishing the district shows that it was adjudicated that the notice was published as required by law, and its finding is not disputed, the subsequent filing of an affidavit of publication is of no consequence, as it is merely additional evidence which does not prove, nor tend to prove, that the board did not have sufficient and proper evidence before them as to the publication of notice when the order was made.

ID.—ANSWER TO OBJECTION OF PETITIONER FOR WRIT OF REVIEW.—It is held a sufficient answer to an objection to the proof of publication by the petitioner for the writ of review that the statute does not require the filing of an affidavit of publication before the order is made, although this would be the usual course, that the publication was actually made as required, that the hearing was had at the proper time, and that such petitioner had actual notice and was present with his objections at the appointed time, and was duly heard by the board before the order was made establishing the district.

ID.—POWER OF SUPERVISORS TO CHANGE BOUNDARIES OF DISTRICT.—The supervisors have power to change the boundaries of the district to make them more definite and certain than in the petition and resolution of intention, or to conform them to the needs of the district.

ID.—PROTECTION DISTRICT ACT CONSTITUTIONAL—POWER OF ASSESSMENT NOT DELEGATED—REPORT OF COMMISSIONERS—HEARING UPON NOTICE.—The act for the formation of protection districts is constitutional and valid. The supervisors are not thereby deprived of the power to levy and fix the amount of the assessment on the lands within the district. That power is not improperly delegated to the commissioners appointed to view the land, make estimates and report their investigations to the board, which sets the same for hearing upon notice and determines the assessment, being limited only as to the proportion imposed upon the county.

ID.—DOUBLE TAXATION NOT INVOLVED.—The act does not involve double taxation. The tax is for the public improvement within a certain district of especial benefit to the lands therein, but incidentally of benefit to the county at large. The land owners cannot complain that part of the tax is assessed to the county; and the general scheme involves the same principle as is found in the reclamation and irrigation district legislation which has been upheld by the higher courts.

ID.—DE FACTO CORPORATION—VALIDITY ONLY ASSAILABLE IN QUO WARRANTO.—The rule that a *de facto* corporation cannot be questioned as to its validity by private individuals, but only in *quo warranto* at suit of the state, applies to a *de facto* protection district.

Id.—WRIT OF REVIEW NOT SUSTAINABLE.—It is held that the writ of review is not sustainable on the merits, whether the protection district was a corporation *de jure* or *de facto*, and that, in either case, the petition for the writ must be denied.

PETITION for writ of review to annul the action of the board of supervisors of Colusa County establishing a protection district.

The facts are stated in the opinion of the court.

Arthur C. Huston, and Ernest Weyand, for Petitioner.

Frank Freeman, for Respondents.

BURNETT, J.—This is a proceeding to review the action of the board of supervisors of Colusa county culminating in the establishment of what is known as “the Boggs Protection District.”

It is conceded that the warrant for the board’s proceedings in the premises is found in the act of the legislature approved March 27, 1895 (Stats. 1895, p. 247), entitled “An act to provide for the formation of protection districts in the various counties of this state, for the improvement and rectification of the channels of innavigable streams and watercourses, for the prevention of the overflow thereof by widening, deepening and strengthening and otherwise improving the same, and to authorize the boards of supervisors to levy and collect assessments from the property benefited to pay the expenses of the same,” and as amended in 1909. (Stats. 1909, p. 807.)

Petitioner bases his request and contention for an annulment of the proceedings of the board creating said district upon the grounds: 1. The board of supervisors had no jurisdiction of the subject matter, for the reason that there was no proof that the petition for the organization of the district was signed by ten property holders as required by the statute; 2. The board proceeded to establish the district without any proof that the notice of intention had been published as required by law; and 3. That the act itself providing for these protection districts is unconstitutional, and therefore void.

The first contention of petitioner is supported—so it is claimed—by the testimony of W. J. King, the county clerk, who testified in this court that he was not present at the meet-

ings of the said board of supervisors when the petition for the formation of the district and the resolution of intention "was up before the board, but after that, at all sessions, I was." When the objections of Mr. Barnes were heard the witness was present and he declared as to what occurred: "My remembrance of it is that Mr. Weyand, on behalf of Mr. Barnes, objected or began talking to the board in regard to it, that there were not property owners that had signed the petition, and Mr. Freeman answered him that the question had been settled when the resolution of intention was published by the board; that that question had previously been settled; and the board proceeded with the other business of the formation of the protection district immediately after that without any further consideration. I do not remember of any testimony on the subject of the ownership of the land. The statements of attorney Weyand and attorney Freeman were all I remember." It is to be observed that the witness is somewhat uncertain as to what occurred. No doubt, however, he details the transaction as he remembers it and, probably, as it took place. We may, indeed, accept his testimony as sufficient to overcome the finding of the board of supervisors that "said petition having conformed to all requirements of the law, and being signed by the proper number of property holders of the district and land owners," and yet this effect must be limited to the particular time concerning which the county clerk testified. We must presume that when the petition was filed the board required and received evidence as to the genuineness of the signatures, and that the signers were "property holders of the district." The presumption that the supervisors did their duty in that regard and the finding that the petition was signed by "the proper number of property holders" must certainly prevail in the absence of any evidence to the contrary. It is not denied that the burden in this proceeding is upon the petitioner to show that the board of supervisors had no jurisdiction to form said district, and it would be singular if the board required no proof as to the signatures before passing a resolution of intention to organize the district. To require such proof is the natural order of procedure contemplated by the statute. And there seems no reason why the evidence should be repeated at the time of the hearing of the objections of the property owners, if any, to said work or

improvement, especially when no such issue is raised by any property owner. The statute provides (section 3) that "Any person interested, objecting to such work or improvement, or to the extent of the district of lands to be affected or benefited by such work or improvement and to be assessed to pay the costs and expenses thereof, may make written objections to the same within ten days after the expiration of the time of the publication of said notice," and thereafter such objection shall be heard by said board. Petitioner herein, in accordance with the said provision of the statute, filed his written objection to the formation of said district to the effect that the work as contemplated would be an injury to his lands—specifying in what respect—and that the formation of said district as contemplated "would burden the general taxpayers of said county with an additional burden to keep up the said works contemplated to be constructed." The return shows that evidence was heard as to these specifications and the finding was against petitioner. The board was not required at that time to do more, assuming that its prior proceedings were regular.

The only additional adverse suggestion as to this refers to the filing of the affidavit of publication. It appears to have been filed subsequent to the order of the board establishing the district, but as stated by respondents, this is of no consequence, "for in fact it shows that the notice was published and may be additional evidence of that fact. The record of the board shows that it was adjudicated that the notice was published as required by law in the 'Daily Colusa Sun.' This finding is not disputed or any showing made that such publication was not made. The filing of this affidavit does not prove or tend to prove that the board did not have sufficient and proper evidence before them as to the publication of the notice." A sufficient answer to petitioner's contention would indeed seem to be that the statute does not require an affidavit of publication to be filed before the order is made, although this would be the usual course, that the publication was actually made as required, that the hearing was had at the proper time, and that petitioner had actual notice and was present with his objections at the appointed time, and was duly heard by the board before the order was made establishing the district. Neither is there any merit in the contention

that the supervisors were divested of jurisdiction by reason of a change in the boundaries of said district. It appears from the return that the description in the order establishing the district was made more definite and certain than in the said petition and resolution of intention, but the identity of the land seemed to be the same. At any rate, the statute authorizes a change as follows: "Such board may, in its discretion, sustain, in whole or in part, any or all of the objections made and filed, and may change or alter the boundaries of such district to conform to the needs of the district."

The objections made to the constitutionality of the act we think are equally untenable. The supervisors are not deprived of the power to levy and fix the amount of the assessment on the land. It is true that the commissioners view *the lands* and the improvements affected, and determine in the first instance the value thereof and the damage to the same, and also the estimated amount of the cost of the proposed work and the expenses incident thereto, and they assess the same upon the lands embraced within the exterior boundaries of such protection district, and report the result of their investigations to the board of supervisors. The latter, however, are not bound to adopt the report. It is set for hearing and notice given thereof, and any objections that may be made by the land owners are considered, and the board of supervisors finally determine the assessment, being limited, however, as to the proportion they may impose upon the county.

The cases cited by petitioner are entirely different. For instance, in *People v. Houston*, 54 Cal. 536, as stated in the syllabus: "By a special act in relation to a swamp land reclamation district, the trustees were required to make up a sworn statement of the cost of the reclamation work 'based upon the books and vouchers thereof,' and the amount so reported was to be assessed upon the lands." The supreme court declared that "It is, in effect, nothing more nor less than an attempt by the legislature to levy an assessment upon the lands of the district—the amount being the sum total shown by the books and vouchers, without any reference to the nature or character of the charges on the books, and irrespective of any question as to whether the law authorizing and providing for the work has been complied with."

So, in *McCabe v. Carpenter*, 102 Cal. 469, [36 Pac. 836], the legislation was condemned, for the reason that the amount of the tax was left wholly to the discretion of an executive officer, and thereby delegating legislative power to the county superintendent of schools.

Nor is the act open to the objection that it involves double taxation. The tax is manifestly for a particular purpose, a public improvement within a certain district, of especial benefit to the lands within said district, but incidentally of advantage to the county at large. The land owners within the district certainly cannot complain that a portion of the tax is assessed to the county, and the general scheme involves the same principle as is found in the reclamation and irrigation legislation which has been upheld by the higher courts.

Aside from the foregoing, there is much plausibility in the suggestion of respondents that we have the case of a *de facto* corporation, and that the only course open to petitioner to have its validity determined is through *quo warranto* by consent of the attorney general. The decisions of the supreme court upon this question were recently reviewed by this court in the case of *Reclamation Dist. No. 765 v. McPhee*, ante, p. 382, [109 Pac. 1106], and it is unnecessary to repeat the discussion. It may be said, though, that *Keech v. Joplin*, 157 Cal. 1, [106 Pac. 222], involved the validity of the organization of a protection district, and the supreme court therein declared that the doctrine applies to such districts as well as to irrigation and reclamation districts, and "the validity of the organization of such a district cannot be questioned by private individuals, but only in a proceeding in *quo warranto* at the suit of the state." The only controversy could be as to whether the record here discloses a *de facto* corporation. As to this point, quotation was made in the McPhee case, *supra*, from *Martin v. Deetz*, 102 Cal. 55, [41 Am. St. Rep. 151, 36 Pac. 368], as follows: "What is a corporation *de facto*? It exists where a number of persons have organized and acted as a corporation; have put on the habiliments of a corporation; have assumed the form and features of a corporation; have conducted their affairs, to some extent at least, by the methods and through the officers usually employed by corporations; and have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body."

The petition and return herein show that at a regular session of the board of supervisors of Colusa county a petition was presented and filed for the formation of a protection district; that said board passed a resolution to improve said Willow creek and to form said protection district; that said resolution was published as required by law; that a hearing of said petition was had by said board, and an order made establishing said district and designating it as the "Boggs Protection District"; that said board adopted plans for the work contemplated, and appointed commissioners to assess damages and to proceed under said act with all matters by the said commissioners deemed necessary, to the end that said Willow creek might be improved and controlled; that said commissioners qualified and were about to proceed with the work required of them when it was arrested by this proceeding. It is clear that the district established had the appearance of a legal corporate body. There was a complete organization of the district under color of title, with no step omitted that the statute makes a prerequisite for the beginning of the work by the commissioners, and it is difficult to perceive how the case would be different in principle if said commissioners had actually proceeded in the work which they contemplated. But it is unnecessary to decide this question, as upon the merits we think respondents should prevail.

The order to show cause is therefore discharged and the writ denied.

Hart, J., and Chipman, P. J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on August 13, 1910.

[Crim. No. 134. Third Appellate District.—July 15, 1910.]

THE PEOPLE, Respondent, v. JOHN G. HEIVNER, Appellant.

CRIMINAL LAW—INCEST WITH SISTER—SUFFICIENCY OF INFORMATION—

ABSENCE OF DEMURRER.—An information, to which no demurrer was filed, which charges the defendant with incest, and substantially follows the language of the statute, sufficiently avers that the prosecutrix was the sister of the defendant by stating that "The said John G. Heivner . . . did willfully, unlawfully and upon the person of one Kate Curless, a sister of the defendant, etc." It is clear that the defendant was thereby informed that Kate Curless was his sister; and it could not have been understood in any other way. Even if it were conceded that the allegation is deficient, it could be attacked only by special demurrer.

ID.—EVIDENCE—VOLUNTARY CONFESSION BY DEFENDANT TO OFFICERS.—

The confession of the defendant made in the presence of the sheriff and district attorney was properly admitted in evidence as voluntary, where both of those officers testified that no inducement was offered or coercion used, and they both relate all that occurred at the time, and it appears from their testimony that only an inference can be drawn therefrom favorable to the ruling of the court admitting the confession in evidence.

ID.—ADMONITION OF SHERIFF TO "TELL THE TRUTH."—The admonition of the sheriff to the defendant to "tell the truth" is not sufficient to avoid the confession.

ID.—ABSENCE OF "ARTIFICE, FALSEHOOD OR DECEPTION."—There is no evidence that the sheriff or district attorney took any advantage of the defendant, or used any "artifice, falsehood or deception" to obtain from him any statement; but their conduct seems to have been altogether decorous, and not violative of any right of appellant.

ID.—CORRECTNESS OF INSTRUCTIONS.—It is held that the court committed no error in giving or refusing instructions; and that every principle of law applicable to the charge against the defendant and to the evidence, and necessary for the enlightenment of the jurors, is found in the instructions given by the trial judge.

ID.—SUPPORT OF VERDICT.—The positive testimony of the prosecutrix, and the confession of the defendant, together with some circumstantial evidence, afford ample support for the verdict.

APPEAL from a judgment of the Superior Court of Tehama County, and from an order denying a new trial.
John F. Ellison, Judge.

H. P. Andrews, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

BURNETT, J.—This appeal invites but brief consideration, as the questions presented involve only familiar and elementary principles.

There is no merit in the contention that the information is insufficient. It follows substantially the language of the statute and it is not obnoxious to just criticism. No demurrer was filed and the only suggestion of infirmity is that there is no positive allegation in the information that the prosecutrix was the sister of defendant. The averment is that "The said John G. Heivner . . . did willfully, unlawfully and feloniously upon the person of one Kate Curless, a sister of the said John G. Heivner," etc. It is clear that by this allegation the defendant was informed that Kate Curless is his sister, and it could not have been understood in any other way. Even if it were conceded that the allegation is defective, it could be attacked only by special demurrer.

Some claim is made that the confession received in evidence was not shown to be voluntary. But in this appellant is entirely mistaken. The sheriff and the district attorney both testified that no inducement was offered nor coercion used. They related all that occurred at the time, and from their testimony only an inference favorable to the ruling of the court can be drawn. The only thing suggesting an approach to coercion is found in the admonition of the sheriff addressed to the defendant to "tell the truth," but this is not sufficient to avoid the confession. In *State v. Staley*, 14 Minn. 113, and cases therein cited, the rule is stated as follows: "The fact that the confession was made in answer to a question assuming the guilt of the person, or was obtained by artifice, falsehood or deception, or preceded by a caution to the accused to tell the truth if he said anything, does not render the confession inadmissible in evidence." It may be said here that there is no evidence that either the sheriff or the district attorney took any advantage of the defendant or used any "artifice, falsehood or deception" to obtain from him any

statement, but their conduct seems to have been altogether decorous and not violative of any right of appellant.

The court committed no error in giving or refusing instructions. Every principle of law applicable to the charge and evidence and necessary for the enlightenment of the jurors is found in the written directions of the trial judge to them, and there is nothing therein of which complaint can justly be made.

The positive testimony of the prosecutrix and the confession of defendant, together with some circumstantial evidence, afford ample support for the verdict, and we see no reason for interfering with the action of the jury.

The judgment and order denying the motion for a new trial are affirmed.

Hart, J., and Chipman, P. J., concurred.

[Crim. No. 258. First Appellate District.—July 19, 1910.]

THE PEOPLE, Respondent, v. O. J. FORTCH, Appellant.

DENTISTRY ACT—MISDEMEANOR FOR VIOLATION IN CITY AND COUNTY OF SAN FRANCISCO—INFORMATION—JURISDICTION OF SUPERIOR COURT.

The superior court of the city and county of San Francisco has jurisdiction of an information for a misdemeanor for violation of the dentistry act as amended in 1909 [Stats. 1909, p. 800], by practicing dentistry without a license, which is punishable by a fine not exceeding \$1,000, or by imprisonment in the county jail not more than one year.

ID.—CONSTITUTIONAL GRANT OF JURISDICTION OF MISDEMEANORS.—The constitution gives to the superior court jurisdiction of all cases of "misdemeanor not otherwise provided for."

ID.—JURISDICTION NOT CONFERRED UPON POLICE COURT BY FREEHOLDERS' CHARTER.—By the freeholders' charter of the city and county of San Francisco, which went into effect on the first Monday in January, 1900, the police court created and established thereunder, as a municipal affair, is vested only with jurisdiction of the violation of municipal ordinances, and over such misdemeanors as are vested in justices of the peace under the general law. But there is no general law conferring jurisdiction upon justices of the peace of

misdemeanors punishable by a fine not exceeding \$1,000, or by imprisonment in the county jail not more than one year.

ID.—REPEAL OF FORMER POLICE COURT ACTS BY FREEHOLDERS' CHARTER.

Although the former police court of the city and county of San Francisco, created under the act of March 5, 1889, as amended and supplemented by the act of February 3, 1893, was vested with jurisdiction of misdemeanors such as are created by the dentistry act, yet those acts were repealed upon the adoption of the freeholders' charter by the terms of sections 6 and 8 of article XI of the constitution, and by the adoption of a police court established thereunder as a municipal affair, by the terms of section 6, and by subdivision 1 of section 8½ of article XI, adopted November 3, 1896.

ID.—ABOLITION OF OLD POLICE COURT—NEW COURT NOT IDENTICAL.—

The police court established by the charter is not the same court referred to in the acts of 1882 and 1893, but is a new court created by a different authority. When the charter court was created, the police court created by those acts went out of existence with the repeal of the acts creating it.

ID.—REPEAL OF LEGISLATION INCONSISTENT WITH FREEHOLDERS' CHARTER.—

No act of the legislature can stand which is inconsistent with a provision in a freeholders' charter in regard to the same subject matter.

ID.—VOID PROVISION FOR CONCURRENT JURISDICTION.—

The provision in the freeholders' charter of the city and county of San Francisco, assuming to give the superior court concurrent jurisdiction with the police court of all misdemeanors, is void.

ID.—ORIGINAL JURISDICTION OF SUPERIOR COURT OVER DENTISTRY ACT.—

There being no other court vested with jurisdiction of the misdemeanor created by the dentistry act, the superior court has original jurisdiction thereof.

ID.—INSTRUCTION AS TO BURDEN OF PROOF UPON DEFENDANT.—

The court did not err in instructing the jury that the burden was upon the defendant to prove that he either had a license from the board of dental examiners of California, or that, at the time of the passage of the act regulating dentistry approved March 23, 1901, he had the lawful right to practice dentistry in the state of California.

ID.—INSTRUCTION AS TO STATUTE DEFINITION OF "PRACTICING DENTISTRY."

The court did not err in giving to the jury the exact language used in the statute defining what is "practicing dentistry," viz.: "That any person shall be understood to be practicing dentistry who shall for a fee, salary or reward, paid directly or indirectly, either to himself or some other person, perform an operation of any kind upon the human jaws or teeth."

ID.—POWER OF LEGISLATURE TO DEFINE DENTISTRY.—

The legislature had the power to define what is meant by the terms "practicing

dentistry," and thus to make clear what acts it intended to make unlawful.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

John T. Williams, and Walter J. Thompson, for Appellant.

U. S. Webb, Attorney General, and Oliver Dibble, for Respondent.

HALL, J.—Defendant was charged, by information, filed in the superior court of the city and county of San Francisco, with practicing dentistry without a license in said city and county, in violation of the so-called "dentistry act," as amended in 1909 (Stats. 1909, p. 800). Upon his trial he was found guilty, and is now before this court upon his appeal from the judgment of conviction and the order denying his motion for a new trial.

The principal point relied on for a reversal of the judgment is that the superior court had no original jurisdiction of the offense charged. The offense is punishable by a fine of not exceeding \$1,000, or imprisonment in the county jail for not more than one year.

The constitution gives to the superior court original jurisdiction of all "cases of misdemeanor not otherwise provided for." Therefore, unless jurisdiction of the class of misdemeanors to which this offense belongs is given by some law to some other court, jurisdiction thereof belongs to the superior court. Appellant's contention is that such jurisdiction is given by the act creating a police court in the city and county of San Francisco approved March 5, 1889 (Stats. 1889, p. 62), and the act amendatory of and supplemental thereto, approved February 23, 1893 (Stats. 1893, p. 9). These two acts may be read as one act, and did give jurisdiction in all cases of misdemeanor punishable by fine not exceeding \$1,000, or by imprisonment not exceeding one year, to the police court created by the act of 1889. The court continued in existence, and the law by which it was created re-

mained in force, until the taking effect of the present charter of the city and county of San Francisco on the first Monday in January, 1900. In accordance with the provisions of section 8½ of article XI of the constitution, adopted in 1896, the present charter creates a police court and defines its jurisdiction. The language of the charter is, "There is hereby created and established in and for the City and County of San Francisco a court to be known as the Police Court of the City and County of San Francisco" (section 1, chapter VIII, article V, charter of San Francisco). Then follow complete provisions defining the jurisdiction of such court, and providing for its regulation and government, and for the manner and time of the election of the judges thereof and its clerks and attaches. The police court established by the charter is not the same court referred to in the act of 1889 and in the supplemental act of 1893, but it is a new court created by a different authority. When the charter court was created the police court created by the act of 1889 went out of existence, and the act of 1889 and the supplemental act of 1893 were repealed. This we understand to be the doctrine laid down in *Graham v. Mayor etc. of Fresno*, 151 Cal. 465, [91 Pac. 147]. It is there said: "The effect of subdivision 1 of section 8½ of article XI was to make the matter of such police courts purely a municipal affair as to any freeholders' charter city which subsequently made appropriate provision in its charter for such court. It confided the subject matter of such courts, and the election and compensation of the judges thereof, to any such city desiring to assume and assuming control thereof, just as by the same section the matter of fixing the compensation of county officers in consolidated cities and counties was confided to the city and county to be provided for in its freeholders' charter. Such jurisdiction could not coexist in both the legislature and the city, and the provision for the assumption of such jurisdiction by the city necessarily contemplated the removal of the same from the legislature whenever the jurisdiction was assumed by the city. Any act of the legislature relative to such subject matter would necessarily be inconsistent with a charter provision in regard to the same subject matter. As to such matters as the constitution authorizes to be provided for in freeholders' charters, the provisions of the charter are su-

preme, superseding all laws inconsistent therewith (Const., art. XI, sec. 6), and being exempt from any control by any subsequent act of the legislature." By the terms of the constitution the subject matter of providing for the *constitution and jurisdiction* of police courts is given to such cities and cities and counties if they so elect. In the case just cited it is said: "Any act of the legislature relative to such subject matter would necessarily be inconsistent with a charter provision in regard to the same subject matter."

The charter provides that it "shall supersede the existing charter of said city and county, and all amendments thereof, and all laws inconsistent with this charter."

It is clear that the effect of the provisions of the charter creating a police court was to repeal the acts of 1889 and 1893, which are the only acts claimed to give jurisdiction of misdemeanors of the class to which the case at bar belongs to any court other than the superior court. For while the charter attempts to give concurrent jurisdiction of all misdemeanors to the superior court and police court, such provision has been declared to be void. (*Robert v. Police Court*, 148 Cal. 131, [82 Pac. 838].) The charter, therefore, as is very properly conceded by appellant, does not give jurisdiction to the police court of the offense of which defendant was convicted. Under the charter the police court has jurisdiction of all prosecutions for violations of ordinances of the board of supervisors, and such jurisdiction as is possessed by justices of the peace in cases of misdemeanors under the general laws. (*Robert v. Police Court*, 148 Cal. 131, [82 Pac. 838].) But there is no general law giving to the justices of the peace jurisdiction over misdemeanors punishable by fine of \$1,000 or imprisonment for one year. As we have shown, the only law relied on by appellant as giving jurisdiction of the offense to any court other than the superior court has been repealed by the adoption of the charter. Neither the act of 1889 nor the supplemental act of 1893 purports to define the jurisdiction of any police court other than the one created by the act of 1889. That such court is a different court from the one created by the freeholders' charter is quite plain. The two courts were created by different authorities, and the creation of the second abolished the first and repealed the acts for its creation. It is therefore plain that the su-

perior court had original jurisdiction of the case at bar, and the contention of appellant upon this point cannot be sustained.

Appellant next contends that the trial court erred in instructing the jury to the effect that the burden was upon the defendant to prove that he either had a license from the board of dental examiners of California, or that at the time of the passage of the act regulating dentistry, approved March 23, 1901, [Stats. 1901, c. 175], he had the lawful right to practice dentistry in the state of California.

The court followed the rule laid down in *People v. Boo Doo Hong*, 122 Cal. 606, [55 Pac. 402], and in so doing committed no error.

The only other point relied on by appellant is that the court erred in charging the jury "That any person shall be understood to be practicing dentistry who shall for a fee, salary or reward, paid directly or indirectly, either to himself or some other person, perform an operation of any kind upon the human jaws or teeth."

This instruction is in the exact language of the statute defining what shall constitute the practice of dentistry within the meaning of the act. The legislature had the power to thus define what it meant by the terms "practicing dentistry," and to thus make clear what acts it intended to make unlawful. (*State v. Yegge*, 19 S. D. 234, [103 N. W. 17].) The instruction was not erroneous.

No other grounds are urged for a reversal, and the judgment and order must be affirmed. It is so ordered.

Cooper, P. J., and Kerrigan, J., concurred.

[Crim. No. 131. Third Appellate District.—July 25, 1910.]

**THE PEOPLE, Respondent, v. ROBERT C. JOHNSON,
Appellant.**

CRIMINAL LAW—DEPOSITION OF ABSENT WITNESS FOR PEOPLE—DILIGENCE BY SHERIFF—SUBPOENA FOR PEOPLE—RELIANCE BY DEFENDANT—ABSENCE OF PREJUDICE.—Where the deposition of a witness for the people taken at the preliminary examination was relied upon by defendant, who sought to prove by the sheriff that the witness could not after due diligence be found in the state, which the court upon objection refused to permit, it is held that even if the court committed technical error in such refusal, it was without prejudice, in view of the admitted facts that defendant issued no subpoena for the witness, that one was issued for the people to the sheriff, that defendant informed the district attorney and sheriff, that he desired the attendance of the witness, and was assured by the sheriff that every effort would be made to secure his attendance, if possible, under the subpoena in his hands.

ID.—“DILIGENCE” A RELATIVE TERM—“DUE DILIGENCE.”—“Diligence” is a relative term, incapable of precise or exact definition; and whether “due diligence,” as contemplated by the statute, has been exercised in a given case, must depend upon the facts and circumstances of such case. What would constitute “due diligence” in one case might fall short of it under another and different state of facts.

ID.—NEGLIGENCE—RELIANCE UPON ADVERSARY FOR PRODUCTION OF WITNESS—GENERAL RULE.—As a general proposition, where a party to an action, whether civil or criminal, depends entirely upon his adversary for the production of a witness whose testimony he relies upon, and can make no further showing, negligence rather than diligence is thus disclosed.

ID.—WANT OF “DUE DILIGENCE” BY DEFENDANT.—The conduct of the defendant, in taking out no subpoena for the absent witness for the people, whose deposition and cross-examination before the magistrate he wished to use in his own behalf, under subdivision 3 of section 686 of the Penal Code, and in stating merely to the sheriff that he desired to use the absent witness at the trial, and requesting him to use every effort to secure his attendance by means of the subpoena issued to him by the district attorney, did not amount to the “due diligence” required on his part before such deposition could be read by him to the jury.

ID.—LEGAL RIGHT OF DISTRICT ATTORNEY TO WITHDRAW SUBPOENA.—The district attorney had the legal right, if he had chosen to exercise it, to withdraw the subpoena issued to him for the absent witness, and to advise the sheriff that, so far as he was concerned,

he need make no further effort to procure the attendance of the witness at the trial; and if he should do so, it must be assumed that he had a just and sufficient reason for his course.

APPEAL from a judgment of the Superior Court of Napa County, and from an order denying a new trial. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

E. S. Bell, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

HART, J.—The defendant was convicted of the crime of manslaughter under an information accusing him of the crime of murder.

This appeal is from the judgment and the order denying defendant a new trial.

The only point made here is on the ruling of the court refusing, it is claimed, to allow the defendant to establish a foundation for the introduction in evidence of the deposition of a witness taken at the preliminary examination of the charge on which the accused was tried.

Section 686, subdivision 3, of the Penal Code, upon which counsel sought to introduce the evidence of said witness, provides, *inter alia*, that “where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state.”

There is no claim that the witness was dead or insane at the time of the trial.

Even if it be true that the court committed, in a strict technical sense, error in its rulings refusing to permit the defendant to make whatever showing of diligence that he could make, still we think that an examination of the admitted facts will disclose that such rulings were without prejudice.

It appears that on the close of the case for the people, counsel for defendant called the sheriff of Napa county to the witness-stand, and by him undertook to lay the foundation for the introduction in evidence of the deposition of said witness. It may be stated that it is only from the colloquy which took place between counsel for the defendant, the district attorney and the court, on objections made by the district attorney to questions put to the sheriff by counsel for defendant, that the facts may be gathered, there being no other showing in the record upon the proposition. Thus we learn that at the preliminary examination one Ira M. Wilson testified on behalf of the people. It further appears from a statement by defendant's counsel that, after the magistrate made the order committing the defendant to trial, a subpoena had been issued at the request of the district attorney, commanding said witness to appear at the trial of the defendant as a witness for the people, and that said subpoena was placed in the hands of the sheriff for service. It is admitted by counsel for the defendant that he did not himself cause a subpoena to be issued for said witness, but he stated to the court, when endeavoring to introduce proof preparatory to the introduction of Wilson's deposition, that he had talked with both the sheriff and the district attorney prior to the date fixed for the beginning of the trial, informing them that he desired Wilson as a witness for his client; that he was told by the sheriff that the latter had in his possession a subpoena for Wilson issued at the request of the people, and that he (the sheriff) was making every effort, and would continue to make every effort, to find and subpoena and have said witness at the trial; that the district attorney stated to him that he (district attorney) would exert his full power to cause the subpoena to be served and have the witness at the trial. In order to lay the foundation for the admission of Wilson's deposition in evidence, the attorney for the defendant sought to show these facts as establishing or tending to establish that the witness could not, after the exercise of "due diligence," be found within the state. The court sustained objections by the district attorney to this line of inquiry, holding that the defendant could not establish the diligence required by the statute unless he could show that he had himself caused a subpoena to be issued for the witness. In other words, the

court, in effect held that proof of the issuance of a subpoena for Wilson on the motion or at the request of the district attorney would not tend to establish "due diligence" on the part of the defendant, where the latter himself had failed to secure a subpoena for the witness; "that," to use the language of the judge, "it was the duty of the defense, if they wanted Mr. Wilson, to issue process of this court to bring him here."

It has been correctly said that "diligence" is a relative term incapable of precise or exact definition, and that whether the "due diligence" as contemplated by the statute has been exercised in a given case must be determined by and upon the facts and circumstances of such case. (See *Heintz v. Cooper*, 104 Cal. 669, [38 Pac. 511].) The circumstances of each case must, therefore, stand as the criteria by which the courts must determine whether the amount of diligence required has been exercised and shown. In other words, there is and can be, obviously, no iron-clad rule which of itself definitely fixes or can so fix or measure the *quantum* of diligence which will satisfy the requirements of the statute in all cases. As is said in the case we have cited, what would constitute "due diligence" in one case might fall far short of it under another and different state of facts. We think it may be safely stated, however, that, as a general proposition, where a party to an action, whether criminal or civil, depends entirely upon his adversary for the production of a witness by whose testimony he expects to sustain his action or defense, and can make no further showing, negligence rather than diligence is thus disclosed. And this seems to have been the course pursued by counsel for defendant. According to his own admissions, he took out no subpoena for Wilson, but merely stated to the sheriff that he desired to use that individual as a witness for his client, and requested the officer to put forth every effort to secure his attendance at the trial by means of the subpoena which had been issued for him at the instance of the district attorney. This action on the part of counsel for defendant did not amount to that diligence which the statute contemplates shall be shown to have been exercised in order to justify a trial court in permitting, under the terms of section 686 of the Penal Code, the deposition of an absent witness to be read to the jury. Assuming it to be true, as counsel

for the appellant declared to the court below, that the sheriff assured him that he would serve the subpoena, if possible, and thus procure Wilson's presence at the trial if he could be found within the state, and that the district attorney made substantially the same promise, which is denied by the district attorney, yet the people's attorney had the legal right, if disposed to exercise it, to withdraw his own subpoena at any time, and to advise the sheriff that, so far as he was concerned, he need make no further effort to procure the attendance of the witness at the trial. In other words, while it is the sworn duty of a district attorney to fairly and impartially prosecute persons accused of crime, and to protect as well the individual rights of an accused person as those of the whole people, whose laws he is specifically enjoined to uphold and maintain, yet there is, and must be, committed to his judgment many matters of discretion in the discharge of his duties as a public official. When he proceeds with the trial of a criminal case, it must be assumed that his investigation of the facts has persuaded him of the guilt of the accused. He is under no legal obligation to subpoena, and much less to introduce, as a witness for the people a person whose testimony he knows will be adverse to the theory of the prosecution, for, having been convinced of the guilt of the accused, it would be widely at variance with the policy of any sensible lawyer to introduce proof destructive of his case which he may perhaps believe has been conceived in a misapprehension of the facts or in a desire to exonerate the defendant through false testimony. Therefore, if in any case he should decide that he does not need or require a certain witness, and in consequence withdraws before the trial a subpoena which he had previously caused to be issued for such witness, he must be assumed to have had a just and sufficient reason for his course, and has thus acted in strict accord with his duty under the law with respect to the case as to which such subpoena has been issued, and with no purpose or desire to thereby unjustly hamper the defendant in a full and fair presentation of whatever defense he may intend to interpose to the charge alleged in the information or indictment. We do not say that the record discloses that the district attorney took this course in the case at bar. We only make these suggestions for the purpose of showing that a party should not

rely upon his adversary for the production of a witness desired by him, and that in doing so, and thus relying upon securing the attendance of the witness or a diligent effort to secure him, he cannot thereafter claim, in the absence of such witness, that he has himself exercised that diligence which alone would entitle him to have his deposition read.

It is very clear, as we have shown, that the defendant here, having relied entirely upon the subpoena issued by the people for the procurement of Wilson as a witness, and having himself admittedly taken no other steps to secure the attendance of the witness, would, had the court permitted him to prove the facts which he claims he could have shown, have utterly failed to lay such a foundation as would have justified the court in allowing Wilson's deposition to be read to the jury at the trial.

The judgment and order are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 716. Third Appellate District.—July 25, 1910.]

D. J. MURPHY, Respondent, v. JAMES T. CASEY, Appellant.

COMPLAINT IN SUPERIOR COURT FOR JURISDICTIONAL SUM—ISSUE—AGREED JUDGMENT FOR \$200—ERROR IN ALLOWING COSTS—REVERSAL OF ORDER.—Where the complaint in the superior court was to recover \$462, and the answer joined issue on the claim, and upon the offer of defendant to allow judgment for \$200, which was accepted by plaintiff, and the agreed judgment was entered upon the day set for trial, and the court allowed costs to plaintiff and denied defendant's motion to strike out his cost bill, it is held on appeal from the order denying such motion that although the precise question does not appear to have been passed upon in this state, yet that the plaintiff, under the facts appearing, was not entitled to recover costs, and that the order appealed from must be reversed.

Id.—RECOVERY OF COSTS STATUTORY.—There must be in any case some statutory warrant for the allowance of costs; and in the absence of a statute allowing costs, no costs can be recovered by either party.

ID.—CODE PROVISIONS LIMITING PLAINTIFF'S COSTS.—Under subdivision 3 of section 1022 of the Code of Civil Procedure, costs are allowed to the plaintiff when he recovers \$300 or more; and section 1025 of that code declares, without qualification or exception, that "no costs can be allowed in any action for the recovery of money or damages where the plaintiff recovers less than \$300." These sections are not to be construed as applicable only to cases where the claim of the plaintiff is litigated, but construing them together with section 997 of that code, providing for a compromise judgment, if that is for less than \$300, costs are equally forbidden in such case by section 1025 thereof.

ID.—CLEAR INTENTION OF LEGISLATURE.—It is very clear that it was the intention of the legislature to disallow costs in any case in which the judgment is for less than \$300, without regard to whether such judgment has been awarded after the issues involved have been actually tried, or is entered without trial by the agreement of the parties.

ID.—DISALLOWANCE OF COSTS IN NATURE OF PENALTY.—The disallowance of costs when the recovery in the superior court is less than \$300 is in the nature of a penalty, and manifestly intended to discourage the bringing of actions in the superior courts which should be tried in justices' courts.

ID.—ACCEPTANCE OF OFFER BY PLAINTIFF—CONFESSION.—The acceptance by the plaintiff of the offer by the defendant to allow judgment to be entered for less than \$300 was tantamount to a confession by plaintiff that the sum offered is as much as he could expect to obtain judgment for under the issue tried and litigated.

ID.—CONSTRUCTION OF SECTION 997.—That part of section 997 of the Code of Civil Procedure which provides that if a plaintiff fails to obtain a more favorable judgment than that involved in an offer of compromise, he cannot recover costs, simply and clearly means that even if, after the refusal of the offer, he should recover a judgment within the superior court's jurisdiction, but less than the amount offered, he would not be entitled to costs.

APPEAL from an order of the Superior Court of Butte County refusing to strike out a cost bill. John C. Gray, Judge.

The facts are stated in the opinion of the court.

Bond & Hays, for Appellant.

Park Henshaw, for Respondent.

HART, J.—The plaintiff brought this action on June 12, 1909, to recover the sum of \$462, an alleged balance due

for board and lodging furnished to certain employees of defendant and for a certain quantity of corn sold and delivered to said defendant by plaintiff.

The defendant answered the complaint in due time, and the cause was set down for trial for December 21, 1909.

On the twentieth day of December, 1909, the defendant served a written offer on the plaintiff to allow judgment to be taken for the sum of \$200. This offer was filed on the twenty-first day of December, 1909, and on the same day the plaintiff accepted in writing said offer, and thereupon judgment was rendered and entered in favor of plaintiff for the amount so offered and accepted.

Respondent thereafter filed his cost bill, and subsequently the defendant moved to strike out the same on the ground that, as the judgment rendered and entered in his favor was for a sum less than \$300, plaintiff was not entitled to costs.

The court made an order denying this motion, and it is from said order that the defendant presents this appeal.

The precise question submitted here is new in California, so far as we know to the contrary. We are of opinion, however, that plaintiff is not entitled to his costs, and that, therefore, the court erred in denying the motion to strike out his cost bill.

There must be in any case some statutory warrant for the allowance of costs. (*Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 223, [54 Pac. 731].) It is said in that case that "the right to recover costs is purely statutory, and, in the absence of a statute, no costs could be recovered by either party." It is quite obvious that, in order to justify the awarding of costs to the plaintiff in the case at bar, there must be imported into the statute language which the legislature has omitted to insert therein, as an examination of the several sections of the code relating to costs will readily affirm.

The offer and acceptance of a compromise judgment is authorized by section 997 of the Code of Civil Procedure, which reads: "The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof, within five days, he may file the offer, with proof of notice of acceptance, and the clerk must there-

upon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer."

Section 1022, subdivision 3, of said code, provides that "costs are allowed of course to the plaintiff, upon a judgment in his favor, . . . in an action for the recovery of money or damages, when plaintiff recovers three hundred dollars or over."

Section 1025 expressly declares, without qualification or exception, that "no costs can be allowed in any action for the recovery of money or damages, when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than three hundred dollars."

Counsel for the respondent undertakes to maintain that the two last-mentioned sections relate entirely to cases wherein the issues tendered are actually litigated and by consequence do not apply to a case like the one at bar, where a compromise judgment is agreed to under the terms of section 997. But we cannot assent to that contention. Construing together, as we must, the three sections of the code mentioned, we think that it is very clear that it was the intention of the legislature to disallow costs in any case in which the judgment obtained is for less than the sum of \$300, without regard to whether such judgment has been awarded after the issues involved have been actually tried or is entered without trial by agreement of the parties. We can perceive no sound or substantial reason for any other construction of the code sections bearing upon the subject of costs.

The disallowance of costs in an action in the superior court where the judgment is for plaintiff in an amount less than the sum of \$300 is in the nature of a penalty, and manifestly intended to discourage the bringing of actions in the superior courts which should be tried in justices' courts. The acceptance by the plaintiff of an offer by the defendant to allow judgment to be entered against him for a sum less than that sued for is tantamount to a confession by plaintiff that the sum offered is as much as he could expect to obtain judgment

for were the issues tried and litigated. No proposition can be more patent than that a compromise judgment taken under the authority of section 997 of the Code of Civil Procedure is no less a judgment than one rendered and entered after a trial, and, as declared, we have been pointed to no section of law relating to costs which can, by any possible construction, authorize, in such a case, the awarding of costs to either party where the judgment agreed to is below the sum of which the superior court has jurisdiction.

That part of section 997 which provides that, if a plaintiff fails to obtain a more favorable judgment than that involved in an offer of compromise, he cannot recover costs, simply and clearly means that even if, after the refusal of the offer, he should receive a judgment for an amount within the superior court's jurisdiction, but less than for the amount offered, he would not be entitled to costs.

The respondent has cited a number of cases which, with the exception of *Lee v. Stern*, 22 Mo. 576, throw little light on the question here. The case mentioned, which undoubtedly sustains the contention of respondent, was where the defendant, having made an offer to plaintiff, under a statute similar in its terms to section 997 of our code, to take judgment for a sum below the court's jurisdiction, which offer was accepted by plaintiff, set up a right to the payment of his costs. The court held that there was no authority under said statute for the awarding of costs to the defendant, and affirmed the judgment for costs to plaintiff. But, as is manifest from what we have already said, we are not in accord with the conclusion reached in the Missouri case.

The construction here given these sections is sustained by the case of *Moffett v. Deom*, 8 N. Y. Civ. Pro. Rep. 85, where, under a statute also similar in its terms to section 997 of our Code of Civil Procedure, the defendant offered to allow the plaintiff to take judgment for a sum less than that of which the court had jurisdiction, and the offer was accepted. Both parties claimed costs. The court held that neither party was entitled to costs; that "as the recovery was less than fifty dollars, there was no authority in the statute entitling the plaintiff to any costs, and the defendant, by making the offer, waived his statutory right thereto." (See *Johnson v. Sagar*, 10 How. Pr. 552.) We think, as we have tried to show, that

the New York case announces the true rule upon the question before us.

The order is reversed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 744. Third Appellate District.—July 26, 1910.]

In the Matter of the Estate of ELIZA CLARK, Deceased.
THE PEOPLE, Appellant, v. ALICE AISTON, Respondent.

ESTATES OF DECEASED PERSONS—DISTRIBUTION—EVIDENCE—DECLARATIONS OF DECEASED BROTHER OF INTESTATE—RELATIONSHIP—INDEPENDENT PROOF NOT REQUIRED.—Whatever may be the rule in other jurisdictions, the rule is settled in this state that evidence of the declarations of a deceased brother of an intestate sister as to the relationship between them are admissible in favor of his daughter as petitioner for distribution of the estate of the deceased sister, without requiring any independent proof as to the relationship between the deceased brother and sister.

Id.—PROOF OF PATERNITY OF CLAIMANT—ADMITTED FACT—DECLARATIONS OF MEMBER OF FAMILY.—The only proof of relationship required is that of the paternity of the declaring brother to the claimant of the estate of the deceased sister; and that fact being admitted, the declarations of the deceased brother are not those of a stranger, but of a member of the family.

Id.—APPEAL—PROOF OF RELATIONSHIP—SUFFICIENCY TO SUPPORT FINDINGS.—It is held, upon appeal by the state from the decree of distribution, upon which the findings were assailed, that the proof fully sustains them, that it is sufficient to identify Eliza Clark, the intestate, as the same one who was sister of the father of the petitioner for distribution, and that the relationship was fully established by the direct testimony of witnesses as well as by evidence of the declarations of members of the deceased brother's family, and also by evidence of the admissions and declarations of Eliza Clark herself, constituting an acknowledgment on her part as to the relationship.

APPEAL from a decree of distribution of the Superior Court of Sacramento County, and from an order denying a new trial. Peter J. Shields, Judge

The facts are stated in the opinion of the court.

U. S. Webb, Attorney General, and Malcolm C. Glenn, Deputy Attorney General, for Appellant.

J. R. Hughes, for Respondent.

BURNETT, J.—This is an appeal by the people of the state of California from a decree of distribution and the order denying a motion for a new trial. It is stated by appellant that these two questions are involved: “First, were the rulings of the trial court correct in the admission of statements claimed to have been made by certain deceased persons, not shown by any independent proof to have been related by blood or marriage to Eliza Clark? Secondly. Assuming all the testimony admissible, was the same sufficient to establish relationship between petitioner and Eliza Clark?”

The distributees claimed through one Jackson Freeman, who was admitted to be the father of Alice Aiston, the petitioner for distribution. Her case rested upon the contention that her father was the brother of said Eliza Clark, deceased. It is conceded by appellant that if Jackson Freeman and Eliza Clark were brother and sister, and this fact was legally shown, then the decree must be affirmed.

The objection of appellant to the admissibility of evidence is addressed particularly to the declarations of said Jackson Freeman, deceased, to the effect that said Eliza Clark was his sister. There are decisions of other jurisdictions in harmony with the contention that before such declarations can be admitted, independent evidence of the relationship of the claimant to the testate or intestate must be introduced, but the question is set at rest in this state adversely to appellant's view by the recent decision of our supreme court in the case of *In the Matter of the Estate of William Hartman, Deceased*, 157 Cal. 206, 107 Pac. 105, where it is held, as stated in the syllabus, that “Declarations made by the father of the contestant to her, during the lifetime of the testator, of his relationship to the testator, are admissible in proof of the same without extrinsic preliminary proof of the relationship of such declarant to the testator, and such declarations do not derive their evidentiary value or competency from their being admissions against the interest of the party making them, but from reasons of necessity, and the probability of their trust-

worthiness." In reviewing the authorities upon the subject it is said: "On the other hand, however, it seems absurd to require, as a foundation for the admission of the declaration, proof of the very fact which the declaration is offered to establish. The preliminary proof would render the main evidence unnecessary. There are statements in the cases which seem to recognize a rule thus rigid and absurd." As pointed out in said decision, the relationship that is required to be shown before said declarations can be admitted is the relationship of the claimant to said declarant. This was covered, as we have seen, by the admission that petitioner is a daughter of said Freeman, and his declarations are therefore not those of a stranger, but of a member of the family.

It is but fair to the attorney general to say that the appeal herein was taken before the Hartman case was decided by the supreme court, and he has not attempted to refute the logic of said decision or to question its conclusiveness as an authority in the case at bar.

There is no more doubt as to the sufficiency of the evidence to support the conclusion of the trial court. We can do no better, perhaps, than to adopt the *résumé* of said evidence furnished by respondent. Among the effects of the intestate found by the administrator were several photographs, a stencil of the name "Eliza Clark," an album and some gold nuggets wrapped in a very old soiled cloth. The photographs were identified as those of the intestate and also of Eliza Clark, the sister of said Jackson Freeman. The intestate resided in Nevada county from 1860 to 1864 and so did the sister. It appears also that Freeman's sister always had a few gold nuggets in a little cloth when she visited him and had a stencil with which she marked her handkerchiefs, the stencil being similar to the one found by the administrator as aforesaid. The foregoing is sufficient to support the finding that Eliza Clark, the intestate, and Eliza Clark, the purported sister of Jackson Freeman, are one and the same person.

The relationship was shown (1) by the direct testimony of a member of Jackson Freeman's family; (2) by evidence of declarations of deceased members of the family of Alice Aiston, made during the lifetime of the intestate; (3) evidence of admissions and declarations of Eliza Clark herself.

As to the first, Alice Aiston testified: "I do not think my father had any other relatives, only this sister, Eliza Clark. I knew Eliza Clark in her lifetime; she was a sister of my father. I am a niece of Eliza Clark. I have seen her on several occasions. We always called her 'Aunt Eliza Clark.' "

As to declarations of members of the family, James Rowe testified that he knew Jackson Freeman and met a person at his home named Eliza Clark in 1857, and Freeman introduced her as his sister and afterward spoke to him about her several times. Alice Aiston testified that her father told her that Eliza Clark was his sister. There is testimony also of declarations of Jackson Freeman's wife to the same effect.

As to the third point, the acquiescence of Eliza Clark when introduced on two separate occasions as the sister of Jackson Freeman is equivalent to an acknowledgment on her part of said relationship, and petitioner testified that the same person represented by the photographs spoke to her concerning this relationship and told her that she was her niece; that she, the said Eliza Clark, was a sister of her, Alice Aiston's, father; that she called her "niece" when she spoke to her, and when she wanted her told her to come to her "aunt."

It is unnecessary to discuss any other question, as the foregoing are the only points upon which appellant relies, and they furnish no reason for disturbing the judgment.

The judgment and order are, therefore, affirmed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 133. Third Appellate District.—July 30, 1910.]

THE PEOPLE, Respondent, v. JOSE VERDUZCO, Appellant.

CRIMINAL LAW—MURDER—SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT.—Where the defendant charged with murder in the first degree was found guilty as charged, and upon appeal claimed insufficiency of the evidence to sustain the verdict, and the evidence all tended to show that there was a common understanding between defendant and his brother, regarding hostility of the deceased manifested especially toward defendant's brother, and that one of them committed the crime, and two eye-witnesses to what occurred testified

that defendant said: "What's with my brother is with me," and that defendant then fired the fatal shot, the evidence is sufficient to support the verdict.

ID.—PROVINCE OF JURY—CREDIBILITY OF WITNESSES—PROBABILITY OF TESTIMONY.—Where there is nothing in the testimony of the eye-witnesses to the homicide not susceptible of reasonable explanation in the light of all the evidence, it was wholly within the province of the jury to pass upon their credibility, as well as the probability of their testimony.

ID.—INSTRUCTIONS—AIDING AND ABETTING HOMICIDE.—Where the defendant claimed that his brother, who escaped, fired the fatal shot, and the prosecution, besides relying upon proof that defendant fired the same, relied also upon a prior understanding between defendant and his brother to make a felonious assault upon deceased and to aid and abet each other in the homicide, the court properly gave instructions based thereon, to the effect that if they were satisfied beyond a reasonable doubt that defendant and his brother did make such assault, "with the defendant and his brother aiding and abetting each other therein, and during such assault Soto was shot, killed and murdered by one of said assailants, according to a common prior understanding, then under such circumstances, . . . no matter which of the two assailants fired the alleged fatal shot, both are equally guilty under the law."

ID.—INSTRUCTION AS TO REASONABLE DOUBT.—An instruction as to "reasonable doubt" which showed no material departure in phraseology or substance from the frequently approved instruction given by Judge Shaw in the Webster case was without error.

ID.—INSTRUCTION AS TO DUTY OF EACH JUROR—CONSULTATION—AGREEMENT.—The court did not err in an instruction the essence of which is that each juror should decide for himself; but that it is his duty to consult with the other jurors, and counsel with them "with the view of reaching an agreement, if they can without violence to their individual understanding of the evidence and instructions of the court"; but if convinced that his views are erroneous, a juror should defer to the views or opinions of the other jurors.

APPEAL from a judgment of the Superior Court of Madera County, and from an order denying a new trial. W. M. Conley, Judge.

The facts are stated in the opinion of the court.

R. E. Rhodes, and G. W. Mordecai, for Appellant.

U. S. Webb, Attorney General, and J. Charles Jones, for Respondent.

CHIPMAN, P. J.—Defendant was charged by information with the crime of murder, was convicted as charged and sentenced to imprisonment for life. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The homicide occurred on the night of July 4, 1909, at the house of one Jesus Belmontes and his wife, Catalina, with whom defendant and his brother, Seferino Verduzco, and deceased, Constantino Soto, were at the time living, the last three named being laborers and working at a mill near the town of Madera. It appeared by the testimony of Mrs. Belmontes that deceased had his supper about 5 o'clock and left the house. Defendant and his brother had supper about half an hour later and also left the house. About 8 o'clock, or shortly after, deceased and Seferino returned to the Belmontes house, deceased entering immediately behind Seferino. The deceased sat down upon a bench near a table and Seferino went to his room, where he remained about five minutes. He re-entered the room where deceased still sat upon the bench and as he passed out he said to deceased: "I don't want any business with you," and the deceased replied: "Neither do I with you." Mrs. Belmontes testified: "In about ten minutes the two Verduzcos returned, Seferino Verduzco and Joe Verduzco. . . . Jose Verduzco in front and Seferino Verduzco behind, both entered about the same time . . . and when Joe entered he said: 'What's up? What passes?' . . . When Verduzco said, 'What's up, what passes,' the deceased replied, 'Nothing is up, nothing passed.' " He was at that time sitting on the same bench where Seferino left him. Mrs. Belmontes was sitting on the opposite side of the table with a child in her arms. She testified that Jose passed one side of her and Seferino on the other toward the bench where deceased sat. When these words passed between Jose and deceased Mrs. Belmontes' husband came out of the bedroom adjoining and placed himself at a point between Seferino and deceased, the latter meantime having arisen to his feet. Mrs. Belmontes testified: "Q. Did any words pass at that time? A. No, sir; when my husband got in between he said: 'What are you going to do?' When Jose Verduzco replied: 'What's up with my brother is with me.' Jose Verduzco then fired the shot." Deceased died from the effect of the wound in about one hour.

Jesus Belmontes testified: "When I heard them saying, this man saying, 'What's up, what passes,' is when I came out and told them I did not want any trouble in my house. Q. Who were in the room when you came out? A. Jose Verduzco and Seferino Verduzco; Soto was there and my wife. Q. Where was Seferino Verduzco? A. He was at one side of the table and they surrounded him from each side. . . . Q. Did you see any weapons in the hands of either one of the Verduzco boys? A. When Jose Verduzco said, 'What is with my brother is with me,' they were close in on him and Seferino had a knife and then I got between him and Seferino. I got in between Jose and Seferino, saying, that they wouldn't strike him, and then the deceased turned around as he indicated by his gestures, toward Jose Verduzco, and then he fired the shot. . . . Q. How did you know that Seferino had a knife? A. Because I saw it when he took it out to strike him. Seferino was nearest to my bedroom. Q. Did you see the flash of the shot? A. When I knew it was a shot, just because I heard the sound and my face was dazed in fire, when I got between Seferino and Jose to defend him against the knife. Q. Did you see the flash come from Jose or Seferino? A. From Jose. I went to the door quickly and pulled the door to and hollered for help." Defendant and his brother immediately went to this door, forced it open and Seferino escaped and has not been heard of since. Jose returned to the Belmontes house and was there arrested about 10 o'clock the same night.

On the 8th of July, following the homicide, defendant made a voluntary statement under oath, in which he claimed that at the request of his brother, Seferino, he went to the Belmontes house; that he was entering the door as he heard a shot and two men ran out whom he did not recognize; that he did not see his brother in the room where the shot occurred and that he did not see him afterward; that Mrs Belmontes had denounced him (Jose) as the perpetrator of the killing, but that he was wholly innocent; that he knew of no trouble between deceased and his brother, Seferino, and there was none between deceased and himself. On the 7th of August following he made another voluntary statement, at variance with his former statement, in which he repeated a conversation he had with his brother, Seferino, in which the latter

spoke of some altercation between him and deceased after which Seferino told him of their going to the Belmontes house together and of Seferino entering his room and coming out again and leaving the house; that not long after, the two brothers returned to the house, and that deceased uttered "some malediction toward his brother," and his brother shot him. It appeared that the three men came from the same part of Mexico and had known each other there, but there was no evidence of any quarrel between them except as above stated. The evidence all tended to show that one of the two Verduzco brothers committed the crime, and the only other witnesses to the tragedy both testified that defendant was the one who fired the fatal shot.

The evidence is challenged as insufficient for its inherent improbability because, as was shown, defendant had borne an excellent character for peace and quiet; that the younger Verduzco fled and defendant stood his ground, conscious of innocence; that defendant had had no trouble of any kind with deceased, and had no ill-feeling toward him, while his brother entertained feelings of hostility toward deceased and was a person of violent temper; that defendant is not shown to have had a pistol, while it did appear that his brother could, and probably did, procure the weapon when he went into their bedroom, as narrated by the witnesses; that it is improbable that Belmontes would have pursued Seferino and paid no attention to Jose if it be true, as he testified, that Jose fired the shot; that the witness Catalina Belmontes first stated to witness Bancroft, who came to the house soon after the affray, that Seferino fired the shot, and that her explanation why she did this and afterward accused Jose is not satisfactory; that Belmontes was shown to have been too deaf to have heard what he testified to, and furthermore that his wife first stated that he was in bed when the Verduzcós entered the house. We shall not undertake to reconcile the alleged improbability of the testimony of the two witnesses to the homicide or point out how the jury might have been able reasonably to do so. Not the slightest suspicion was by the evidence cast upon anyone but one or both of the Verduzcós as the perpetrators of the crime. Jose's statement, upon entering the room with his brother, that "What is with my brother is with me," coupled with the other proven facts,

was sufficient justification for the jury to infer a common understanding between Jose and Seferino when they confronted the deceased. We find nothing not susceptible of reasonable explanation, in the light of all the evidence, which seriously conflicts with the truth of the narrative of the killing as given by the only two eye-witnesses. The responsibility of passing upon their credibility as well as upon the probability of their testimony was upon the jury, and we can find no warrant in the record for assuming this responsibility.

The court instructed the jury that if they were satisfied beyond a reasonable doubt that deceased was killed by the inflicting of a gunshot wound, and that, immediately prior thereto, defendant and his brother "reached an understanding that they two together would commit a felonious assault upon said Soto and would kill and murder him, and that in pursuance of said understanding said defendant and his brother Seferino Verduzco did make such assault upon Soto, with the defendant and his brother aiding and abetting each other therein, and during such assault Soto was shot, killed and murdered by one of said assailants according to a common, prior understanding, then, under such circumstances, the court instructs you that no matter which of the two named assailants fired the alleged fatal shot, both are equally guilty under the law." The court also in this connection instructed the jury: "If there exists in your minds a reasonable doubt as to whether the defendant shot and killed the deceased, then you shall find defendant not guilty, unless you are convinced from the evidence to a moral certainty and beyond a reasonable doubt that the defendant aided and abetted, or advised and encouraged another in the commission of the crime. In this connection you are instructed if you believe from the evidence that the deceased was unlawfully killed by Seferino Verduzco and there exists in your minds a reasonable doubt as to whether the defendant aided and abetted, or advised and encouraged the commission of the crime, then your verdict must be not guilty."

It is true that the prosecution relied upon the evidence that the fatal shot was fired by defendant, but it also relied upon a common understanding between the brothers Verduzco. Furthermore, the contention of defendant was that defendant's brother, and not defendant, was the guilty assailant and

fired the shot. The evidence presented the case where there might be doubt as to which one of the two assailants was the immediate cause of the killing, and notwithstanding such doubt, both might be equally guilty if the jury found the facts to be as pointed out in the instructions complained of. We see no error in these instructions.

Error is assigned in the giving of the instruction on reasonable doubt. We can discover in this instruction no material departure in phraseology or substance from the stereotyped and frequently approved instruction that has come down to us from Judge Shaw in the trial of Professor Webster. The statements that "everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt," and that the reasonable doubt referred to "is that state of the case," etc., have too often survived the criticism to which they have been subjected to leave their correctness any longer in doubt.

The court instructed the jury as follows: "In conclusion, you are instructed that if, after a full consideration of the entire evidence in this case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so doing for the single reason that a majority of the jury should be in favor of a verdict of guilty. In this connection you are instructed that juries are impaneled for the purpose of agreeing upon verdicts if they can conscientiously do so. They are admonished at each recess of the court not to form an opinion as to the merits of the case until it shall be finally submitted to them, and when it is so submitted it is the duty of jurors to deliberate and consult together with the view of reaching an agreement, if they can, without violence to their individual understanding of the evidence and instructions of the court. It is true that each juror must decide the matter for himself, yet he should do so only after a consideration of the case with his fellow-jurors, and he should not hesitate to sacrifice his views or opinions of the case when convinced that they are erroneous, even though in so doing he defer to the views or opinions of others."

The objection to this instruction is aimed particularly at the concluding paragraph, by which it is urged that the in-

dividual juror was required to render a verdict on the opinion of his fellow-jurors. The essence of the instruction is that each juror should decide for himself, but that it is his duty to consult with the other jurors, counsel with them, "with the view of reaching an agreement, if they can, without violence to their individual understanding of the evidence and instructions of the court." But if convinced that his views are erroneous, a juror should defer to the views of others. It is claimed that the instruction is "diametrically antagonistic" to the rule announced in *People v. Dole*, 122 Cal. 488, [68 Am. St. Rep. 50, 55 Pac. 585], where the court held that an instruction, as asked, should have been given, which said, among other things: "If after a consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so doing for the single reason that a majority of the jury should be in favor of a verdict of guilty." The difference between the two cases is obvious. In the instruction now before us the very proposition laid down in the *Dole* case is stated, and it was only when the juror should become convinced that his views of the case were erroneous that he was told that he should defer to the opinions of the other jurors.

We discover no prejudicial error in the record, and the judgment and order are therefore affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 20, 1910.

INDEX—VOL. 13.

ACCORD AND SATISFACTION. See Contract, 8.

AGENCY.

1. **EXCLUSIVE AGENCY FOR SALE OF MOTOR CARS—BREACH OF CONTRACT BY PRINCIPAL—SUPPORT OF FINDINGS.**—In an action by one to whom an exclusive agency was contracted for to sell defendant's motor cars within a specified territory, to recover from the principal damages for the breach of such contract, it is held that findings that plaintiff complied with the contract on his part and was at all times ready, able and willing to perform it in all respects, but that defendant violated the contract, to plaintiff's great damage, by soliciting orders within the territory allotted to such exclusive agency, in violation and breach of its contract with plaintiff, are fully supported by the evidence. (Schiffman v. Peerless Motor Car Co., 600.)
2. **MEASURE OF DAMAGES FOR BREACH OF CONTRACT.**—The measure of damages for such a breach of the obligation of the contract is found in the general rule presented in section 3300 of the Civil Code, as being that amount which will compensate the plaintiff for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. (Id.)
3. **DEPRIVATION OF PROFITS NOT SPECULATIVE OR UNCERTAIN.**—The profits which plaintiff was deprived of by the breach of the contract for an exclusive agency in specified territory are those which he would have made from the sale of machines wrongfully sold by defendant therein, had the defendant refused to invade the exclusive territory granted to him, or have referred inquiries of purchasers to him as it agreed to do in the contract. There is nothing speculative or uncertain as to the amount of the profits of which plaintiff was thus deprived, but their loss is so closely connected with the breach of the obligation that the injury is not remote in its nature or origin. (Id.)
4. **PROFITS AND ADVANTAGES EXPRESSLY AGREED.**—When profits and advantages are expressly stipulated for in the contract, and are the real purpose and direct and immediate fruit of a contract, they are part and parcel of it and must be considered as entering into and constituting a portion of its very elements, and they cannot be said to be collateral or remote. (Id.)
5. **ESTOPPEL OF DEFENDANT.**—The defendant violating its express contract is estopped to deny that plaintiff would have made sale of the machines sold by defendant but for its violation of the contract. (Id.)

dividual juror was required to render a verdict on the opinion of his fellow-jurors. The essence of the instruction is that each juror should decide for himself, but that it is his duty to consult with the other jurors, counsel with them, "with the view of reaching an agreement, if they can, without violence to their individual understanding of the evidence and instructions of the court." But if convinced that his views are erroneous, a juror should defer to the views of others. It is claimed that the instruction is "diametrically antagonistic" to the rule announced in *People v. Dole*, 122 Cal. 488, [68 Am. St. Rep. 50, 55 Pac. 585], where the court held that an instruction, as asked, should have been given, which said, among other things: "If after a consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so doing for the single reason that a majority of the jury should be in favor of a verdict of guilty." The difference between the two cases is obvious. In the instruction now before us the very proposition laid down in the *Dole* case is stated, and it was only when the juror should become convinced that his views of the case were erroneous that he was told that he should defer to the opinions of the other jurors.

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5. **ESTOPPEL OF DEFENDANT.**—The defendant violating its express contract is estopped to deny that plaintiff would have made sale of the machines sold by defendant but for its violation of the contract. (Id.)

AGENCY (Continued).

6. **SALES OF LUMBER—COLLECTION AGENT FOR DEFENDANT—DELIVERY OF ORDERS TO CUSTOMERS—CHARGE TO AGENT—PAYMENT OF EXCESS—RECOVERY BY ASSIGNEE.**—When a lumber company, assignor of plaintiff, stood in the position of an agent for defendant company in collecting sales of its lumber and making collections, and the lumber sold was directly delivered by defendant to each customer and the price charged to its agent, the agent can only be held chargeable with the actual contract price of the lumber shipped to a customer; and where, by mistake, an overcharge was made to the agent, and the excess was paid to defendant, in ignorance of the error, the agent company was entitled to reimbursement from defendant of the amount of the error occasioned by defendant's act, and the plaintiff company, as its assignee, may recover judgment for such amount, where no part of it was ever paid. (*Kiefhaber Lumber Co. v. Consolidated Lumber Co.*, 111.)
7. **SUFFICIENCY OF ASSIGNMENT.**—A written bill of sale subsequently made by the agent company transferring all of its assets to the plaintiff company, including its claim against the defendant for reimbursement of the excess paid to defendant, entitles the plaintiff to recover the amount thereof. (*Id.*)
8. **ASSIGNMENTS OF INSUFFICIENCY OF EVIDENCE—SUPPORT OF FINDINGS AND JUDGMENT.**—Where the only specifications of error made by the defendant company appealing relate to the insufficiency of the evidence to sustain the findings, and there is evidence sufficient to support every finding made by the court in favor of plaintiff and its assignor, and against the answer of the defendant, and the findings support the judgment for plaintiff, the decision of the trial court must be sustained. (*Id.*)

See Attorney at Law; Assignment, 9, 12-16, 21, 22; Contract, 42; Corporations, 8, 11, 22-24.

APPEAL.

1. **APPEAL FROM JUDGMENT—DISMISSAL—FAILURE TO FILE TRANSCRIPT IN TIME—INSUFFICIENT EXCUSE.**—An appeal from the judgment must be dismissed for failure to file the transcript in time, where no such facts appear to excuse the delay as are stated in rule II of this court. The pendency of an appeal from an order refusing to change the place of trial is no sufficient excuse for failure to file the transcript on appeal from the judgment within the time limited therefor. (*Nutley v. Metropolis Construction Co.*, 588.)
2. **APPEAL FROM JUDGMENT—DISMISSAL—FAILURE TO FILE TRANSCRIPT IN TIME—INSUFFICIENT EXCUSE—APPEAL FROM VENUE ORDER.**—An appeal from the judgment must be dismissed for failure to file the transcript in the time limited by the rules of the court, if there is no unsettled statement or bill of exceptions that might be used di-

APPEAL (Continued).

rectly on such appeal. It is an insufficient excuse to prevent such dismissal that an independent appeal is also pending from an order refusing to change the place of trial, and that there is an unsettled bill of exceptions thereon, and that appellant wishes to incorporate such appeal with the appeal from the judgment. (Union Lumber Co. v. Metropolis Construction Co., 584.)

3. **CONSTRUCTION OF RULE II—PENDENCY OF BILL OF EXCEPTIONS OR STATEMENT.**—The bill of exceptions or statement of the case unsettled, allowing an excuse for delay in filing the transcript under rule II, is a bill or statement "which may be used in support of such appeal"—that is, the appeal from the judgment—and that rule does not refer to a bill of exceptions such as was prepared on a motion to change the place of trial. (Id.)
4. **SHOWING BY COUNTER-AFFIDAVIT—INSUFFICIENT GROUND FOR CHANGE OF VENUE—DEMAND AFTER RULING ON DEMURRER.**—Where the counter-affidavit for respondent shows that the appellant failed to file his motion or demand or affidavit of merits for a change of the place of trial until after a demurrer filed to his complaint had been overruled, upon such showing he failed to comply with the statute, and his demand should be denied. (Id.)
5. **INSUFFICIENT SHOWING BY APPELLANT—PRESUMPTION OF INSUFFICIENT GROUNDS.**—Where the grounds on which the change of the place of trial was moved for by the appellant do not appear, presumptively they were wholly insufficient and the motion properly denied, and it may be, as shown by respondent, that one of the grounds on which the court denied the motion was that the demand was not made in time. (Id.)
6. **NOTICE—JUDGMENT AND ORDER—SUFFICIENCY OF EVIDENCE—RECORD—JUDGMENT-ROLL—ABSENCE OF EVIDENCE—PRESUMPTION—AFFIRMANCE.**—Where a notice of appeal was from the judgment and from an order denying a new trial, and the appeal is based upon the sole ground that the evidence does not support the findings, but the sole record upon appeal consists of the judgment-roll comprising the complaint, answer, findings and judgment, without any evidence brought up, and the transcript fails to show that any motion for a new trial was made, in this condition of the record, it must be assumed that the evidence was sufficient to support the findings, and where the findings are sufficient to support the judgment, the judgment and order must be affirmed. (Brown v. Grand Lodge of Ancient Order of United Workmen of California, 537.)
7. **ACTION BY WIFE UPON BENEFIT CERTIFICATE—PRESUMPTION OF DEATH OF HUSBAND—DILIGENT SEARCH—CONCLUSIVE FINDING.**—In an action by a wife upon a benefit certificate payable to her upon her husband's death, his death must be presumed from his pro-

APPEAL (Continued).

longed absence for seven years, where it is conclusively found, in the absence of any evidence in the record, that the wife had made diligent search for her absent husband, and had made inquiries at all places where her husband might reasonably be expected to be found, if alive, and that she had exhausted every source of information in her efforts to locate him, but all without avail. (Id.)

8. **ORDER APPOINTING RECEIVER—STAY OF EXECUTION—DUTY OF TRIAL JUDGE—MANDAMUS.**—Upon appeal from an order appointing a receiver, it is the duty of the judge of the superior court to fix the amount to be specified in an undertaking to stay the execution of the order pending the appeal; and in case of his refusal to do so, the writ of mandate will lie to compel such action. (Winsor Pottery Works v. Superior Court, 360.)
9. **PETITIONER AGGRIEVED BY ORDER APPEALED FROM.**—Where the petitioner was made a party defendant to the receivership of corporation property, and it was sought to take possession of lands owned by him and recover possession of the same, he was aggrieved by the order and entitled to appeal therefrom, and had the right to give an undertaking to stay its execution. (Id.)
10. **ALTERNATIVE METHOD—SERVICE OF NOTICE—DEFECTIVE BOND—JURISDICTION—MOTION TO DISMISS.**—Although an appeal seems to have been attempted under the former method by service of the notice and the filing of a defective bond, yet since, under the alternative method, no bond is required to give this court jurisdiction of the appeal, it cannot be dismissed on motion for mere insufficiency of the bond. (Colusa Milling Co. v. Draper Dray and Storage Co., 329.)
11. **DISMISSAL FOR NEGLECT TO FILE TRANSCRIPT IN TIME.**—Under rules II and V of this court, if the appellant in a civil action has, without excuse, failed to file the transcript within forty days after the appeal is perfected, the respondent is entitled upon motion, after notice given, to have the appeal dismissed. (Id.)
12. **DISMISSAL—FAILURE TO FILE TRANSCRIPT—NONAPPEARANCE OF APPELLANT—PRESUMPTION—VEXATIOUS APPEAL FOR DELAY—DAMAGES.**—Upon a motion to dismiss an appeal for failure to file the transcript within the time limited, and for damages for a vexatious appeal for delay, where, after the service of the appellant with notice of the motion, the appellant fails to respond, and no excuse appears for the delay, it must be assumed that the purpose of the appeal was as stated in the motion of respondent, and the appeal will be dismissed, with damages assessed against the appellant. (Chiafullo v. Schwab, 152.)
13. **MOTION TO DISMISS—TIME FOR FILING POINTS AND AUTHORITIES—DEATH OF RESPONDENT'S ATTORNEY—PROCEEDINGS SUSPENDED**

APPEAL (Continued).

—**MOTION DENIED.**—Under section 286 of the Code of Civil Procedure, upon the death of the attorney for respondent, all proceedings against respondent on behalf of appellant were suspended until such time as respondent voluntarily, or in response to proceedings instituted by appellant, appointed another attorney, or appeared personally; and where a newly appointed attorney for respondent at once moved to dismiss the appeal for failure of appellant to file its points and authorities in time, and it appeared that at the time of such death appellant had unexpired time therefor, they were properly filed within such time after appointment of the new attorney, and when filed within proper time thereafter, the motion to dismiss the appeal must be denied. (Troy Laundry Machinery Company, Limited, v. Drivers' Independent Laundry Company, 115.)

14. **APPEAL FROM JUDGMENT—ABSENCE OF SUMMONS, DEMURRER OR ANSWER—RECITAL IN JUDGMENT OF APPEARANCE BY ATTORNEYS.**—Upon an appeal from a judgment upon the judgment-roll, the judgment cannot be reversed merely because the judgment-roll contains no summons or evidence of service thereof, nor any demurrer or answer, where the judgment recites that the defendants so appealing appeared by attorneys, and there is nothing in the record to contradict such recital. (Brown v. Caldwell, 29.)
15. **NOTICE OF APPEARANCE NO PART OF JUDGMENT-ROLL.**—While, under section 1014 of the Code of Civil Procedure, the answer or demurrer therein provided for is made by section 670 thereof part of the judgment-roll, the notice of appearance provided for in the former section is made no part of the judgment-roll. (Id.)
16. **EFFECT OF RECITAL IN JUDGMENT—PRIMA FACIE EVIDENCE—PRESUMPTION—SUPPORT OF FINDING.**—The recital in the judgment that defendant appeared by his attorneys is *prima facie* evidence of such fact; and where nothing appears in the record upon appeal in contradiction of the fact so found, it must be presumed that the evidence presented to the court fully supports such finding. All presumptions are in favor of the correctness of the judgment appealed from. (Id.)
17. **JURISDICTION OF PERSON—ENTRY OF DEFAULT NOT ESSENTIAL TO JUDGMENT.**—It appearing that the court obtained jurisdiction of the person of the defendant so complaining, by reason of his appearance, no formal entry of his default was necessary to enable the court to render judgment against him by default. (Id.)
18. **EXCESSIVE ALLOWANCE OF INTEREST—MODIFICATION OF JUDGMENT.** Where no issue was joined on the question of interest, no relief can be granted to the plaintiff in excess of the interest credited and claimed to be due only from a certain date; and the judgment must be modified as to interest allowed from a prior date.

APPEAL (Continued).

As against the defaulting defendant, the relief granted could not exceed that prayed for in the complaint. (Id.)

19. **APPEAL FROM NEW TRIAL ORDER—"STATEMENT OF CASE"—"BILL OF EXCEPTIONS"—SPECIFICATIONS—REVIEW.**—Where the notice of motion for a new trial specified that it would be made upon a "statement of the case," and the trial judge designated it in his settlement as a "bill of exceptions," it may be treated either as a statement or a bill of exceptions, and it is sufficient that, in either case, the specifications of the errors occurring at the trial and excepted to, for which a reversal of the order denying the new trial is asked, are sufficiently pointed out to have enabled the trial court properly to consider them, and to enable this court to review them without difficulty or inconvenience. (Northwestern Redwood Co. v. Dicken, 689.)
20. **REASONS OF TRIAL COURT FOR DECISION—REVIEW UPON APPEAL.**—An appellate court is not bound by the reasons given by the trial court for its decision. It is the judicial action of the trial court, as distinguished from its judicial reason, which appellate courts are called upon to review, and if the former be correct, the appellate court will not concern itself about the latter. (County of Los Angeles v. Winans, 257.)
21. **JUDGMENT—DISMISSAL OF APPEAL.**—An appeal from a judgment taken more than two years after its entry cannot be considered, and must be dismissed. (Sheakley v. Nelson, 379.)
22. **ORDER DENYING NEW TRIAL—REVIEW UPON APPEAL.**—Upon an appeal from an order denying a new trial, neither the sufficiency of the pleadings nor of the findings to support the judgment can be reviewed upon appeal. (Id.)
23. **SUPPORT OF FINDINGS—CONFLICTING EVIDENCE—CREDIBILITY OF WITNESSES.**—*Held*, that the findings were sufficiently supported by the evidence, though conflicting, and that the credibility of the witnesses was for the determination of the trial court. (Id.)
24. **REVIEW OF EVIDENCE—CONFLICT.**—Where the evidence is conflicting, the findings of the trial court will not be disturbed upon appeal. (Swanson v. Wilsen, 389.)

See Criminal Law, 1, 3, 6, 7, 10, 11, 30, 34, 85, 86, 142, 152, 203-205, 268; Estates of Deceased Persons, 2, 6-8, 10-14; Justice's Court; New Trial, 1, 6, 8, 13; Receiver; Street Assessment, 8, 13.

APPEARANCE. See Appeal, 14-16; Criminal Law, 12-16; Mechanics' Liens, 4-6; Practice.

ARSON. See Criminal Law, 34-49.

ASSAULT. See Criminal Law, 50-58.

ASSIGNMENT.

1. ACTION BY ASSIGNEE OF BANK DEPOSIT RECEIPT—NON-NEGOTIABLE INSTRUMENT—EFFECT OF ASSIGNMENT.—A bank deposit receipt for money locally deposited by an American Commercial Company with an International Banking Company doing business at Hongkong, repayable there with interest at five per cent, to remain until twelve months' notice on either side expires, to be paid on return of the receipt properly indorsed by the depositors, and stamped "not transferable," is a non-negotiable instrument, under the law-merchant, but is assignable, though the assignee obtains no better title to the instrument than his indorser, notwithstanding it was indorsed to him before maturity. (*Dollar v. International Banking Corporation*, 331.)
2. DEMAND OF PAYMENT AT HONGKONG—REFUSAL—ACTION IN THIS STATE.—Where payment of the note was demanded in Hongkong by the assignee of the instrument, and payment was there refused, an action may be maintained against the International Banking Company in this state, where it has an office here, and enters an appearance and questioned the sufficiency of the complaint. (*Id.*)
3. IMPORTANCE OF PROPER DEMAND.—Whether or not proper demand was made at the place of payment becomes important in determining the right to bring the action in a court of this state, as well as in ascertaining upon what basis the value of the money so deposited is to be fixed, if plaintiff is entitled to recover. (*Id.*)
4. INDORSEMENT TO PLAINTIFF'S ASSIGNOR—PAYMENT OF ASCERTAINED DEBT OF PAYEE—JUDGMENT OF CONSULAR COURT.—Where the indorsement of the payee to plaintiff's assignor was in consideration of the payment of an indebtedness of the payee to the assignor, the judgment of a consular court establishing the debt established nothing more than that the corporation payee was indebted to the first assignor in the sum named in the judgment, upon payment of which the corporation payee made the indorsement. (*Id.*)
5. INEFFECTIVE SUPPLEMENTAL DECREE—ATTEMPT TO TRANSFER TITLE.—A so-called supplemental decree of the consular court, attempting to transfer the title of the corporation payee to the debtor, was ineffective for that purpose, and did not affect the contract between that company and the banking corporation appellant. (*Id.*)
6. EQUITABLE ESTOPPEL NOT PLEADED.—An agreement made between the manager of the banking corporation and the creditor of the payee that if he obtained a judgment against the corporation payee for an amount equal to or greater than the debt of the banking corporation therein, and the debt was applied upon it, the banking corporation would make payment of the certificate to such satisfied

ASSIGNMENT (Continued).

creditor on presentation, was based upon an equitable estoppel, which is not available unless pleaded. (Id.)

7. **BASIS OF RECOVERY.**—If plaintiff, as assignee of such first assignee, recover in the action, he must do so on the theory of the enforcement of the express contract made with the managing agent of the corporation payee, or the implied contract made by said corporation with the depositor. (Id.)
8. **FINDINGS ON SECOND DISMISSED CONSULAR ACTION NOT CONCLUSIVE.**—It is held that findings in a second consular action dismissed without prejudice to a new action were conclusive upon neither party, there being no finding that it was rendered for want of authority accompanying the presentation of the certificate by the plaintiff's assignor. (Id.)
9. **TESTIMONY SHOWING AUTHORITY OF MANAGING AGENT OF PAYEE IN CHINA.**—Where the testimony clearly establishes that the vice-president of the corporation payee was its managing agent in China and transacted all its business therein, created debts against the company and paid them in its name, and that no other person acted as its agent in China, such managing agent was authorized to collect the debt, or to make an assignment thereof in payment of the company's debt to an assignee, as such manager. (Id.)
10. **CONCERN OF DEFENDANT BANK.**—The defendant banking corporation is concerned only in knowing that the assignment of the evidence of debt or chose in action against it is of such character as to bind the assignor payee. (Id.)
11. **INCOMPETENT ORAL CONTRACT WITH PAYEE.**—The incompetency of parol evidence to vary a writing may be considered as matter of law, though admitted without objection; and if the American Commercial Company, by its general manager, had itself presented the deposit receipt and demanded payment, no compliance with an oral contract that the managing agent should produce a resolution of the board of directors could have been made by the defendant a condition precedent to payment of the deposit to such manager. (Id.)
12. **AUTHORITY OF MANAGING AGENT TO MAKE ASSIGNMENTS.**—Where the managing affairs of a corporation are intrusted to a general managing agent, he has power to transfer the chose in action of the corporation to its creditors, either in payment or as security for a pre-existing debt of the corporation, without express authority from the board of directors, and an assignment so made is valid. (Id.)
13. **PRESUMED AUTHORITY OF MANAGING AGENT—EXPRESS AUTHORITY NOT NECESSARY.**—The presumption is that such assignment was made by competent authority. No special resolution authorizing him to act in this respect was necessary. (Id.)

ASSIGNMENT (Continued).

14. **OSTENSIBLE AGENCY.**—An ostensible agency is created when the principal intentionally or by want of ordinary care authorizes a third person to believe another to be his agent, even if not really employed by him. The authority of such an agent is such as the principal allows such person to believe the agent to possess. (Id.)
15. **GOOD FAITH OF CREDITOR PERFORMING SERVICES FOR PAYEE, AT REQUEST OF MANAGING AGENT.**—Where there is no question of the good faith of the first assignor of the bank deposit in doing services for the corporation payee, at request of its managing agent, or in taking a receipt of its indebtedness in full payment of the bank certificate, he thereafter stood in the shoes of the American Commercial Company as the owner of the paper, subject only to such equities as the bank might set up against the company payee itself. (Id.)
16. **ORAL CONTEMPORANEOUS AGREEMENT AS TO PROOF OF AGENT'S AUTHORITY NOT BINDING ON ASSIGNEE.**—The oral contemporaneous agreement between defendant and the agent of the corporation payee as to proof of his authority, not being binding upon the payee, can constitute no defense to the action of the assignee of the payee, or his successor in interest. (Id.)
17. **ACQUITTANCE BY ASSIGNEE PROTECTION TO BANK.**—The acquittance by the *bona fide* assignee of the corporation payee would be a sufficient defense in favor of the banking corporation defendant to any subsequent demand upon the bank by the corporation payee. (Id.)
18. **CONTEMPORANEOUS ORAL AGREEMENTS BETWEEN PARTIES TO WRITTEN CONTRACT FOR MONEY.**—Contemporaneous oral agreements between the parties to a written obligation to pay money, as to the manner of the negotiation, cannot be set up as a defense against payment of the money under the contract in an action by the payee or his assignee. (Id.)
19. **RULE AGAINST VARIATION OF WRITTEN CONTRACTS BY PAROL EVIDENCE—APPLICABILITY TO NON-NEGOTIABLE PAPER.**—Such oral agreements come under the rule that written contracts cannot be varied by parol agreements, and this rule is applicable to such agreements, irrespective of whether the instrument be negotiable or non-negotiable. (Id.)
20. **INCOMPETENCY OF PAROL EVIDENCE DISTINGUISHED FROM SECONDARY EVIDENCE.**—The rule that incompetent parol evidence to vary a writing can have no legal effect, though proved without objection is to be distinguished from the rule as to second evidence. (Id.)
21. **AUTHORITY OF MANAGING AGENT—NEGATIVE AND POSITIVE PROOF.**—The failure of the corporation payee to object at any time to the authority assumed by its managing agent in China, and the absence of any proof by the defendant that he lacked such authority,

ASSIGNMENT (Continued).

taken in connection with the positive proof that he was such managing agent, and exercised all the authority of the corporation payee in China, together constitute competent proof of his authority as such managing agent. (Id.)

22. TESTIMONY TO AUTHORITY OF AGENT—INFERENCES—FACTS STATED—APPELLANT NOT PREJUDICED.—Where the assignee of the payee, in testifying to the authority of the managing agent, made statements in the nature of conclusions or inferences, but these were accompanied by a statement of the facts from which the inferences were drawn, it cannot be said that such inferences objected to could have been prejudicial to the appellant's case before the trial court. (Id.)

23. DEMAND REGULARLY MADE BY ASSIGNEE—DAMAGES—INTEREST.—The demand having been regularly made by the first assignee at Hongkong, the damages for failure to pay are to be computed under the rule declared in subdivision 1 of section 3336 of the Civil Code, which would entitle the plaintiff to the market value at Hongkong when payment was refused, with interest, as allowed in the judgment. (Id.)

24. INDEMNITY BOND NOT REQUIRED UPON LOSS OF NON-NEGOTIABLE INSTRUMENT.—The rule in courts of equity that a bond will be required upon a lost instrument has well-recognized exceptions, one of which is where the note is non-negotiable. (Id.)

See Agency, 6-8; Promissory Note, 4; Specific Performance, 5, 9, 11.

ATTACHMENT.

1. NEGOTIABLE NOTE MADE OUT OF STATE—FOREIGN CORPORATION—PLACE OF PAYMENT—CODE PROVISION—PRESUMPTION.—Although section 3100 of the Civil Code provides that "a negotiable instrument which does not specify a place of payment is payable at the residence or place of business of the maker, or wherever he may be found," yet, where the maker is a foreign corporation having its principal place of business in Boston, Massachusetts, where all of its directors reside, and where its note was executed and dated, without designating a place of payment, it was presumptively payable there, in relation to the attachment laws of this state, and though such corporation is doing business in this state, in compliance with its laws, an attachment against it on such note will not lie in this state. (Atwood v. Little Bonanza Quicksilver Co., 594.)

2. PROVISIONS OF ATTACHMENT LAW—CONTRACT MADE OUT OF STATE—EXPRESS PAYMENT IN STATE ESSENTIAL.—To authorize an attachment in this state upon a contract not made in the state, it must appear that the money must have been made payable in this state by the contract itself. The right of attachment, in such case, depends upon the contract being for the direct payment of money, and

ATTACHMENT (Continued).

it is essential to such right that the agreement itself should contain some provision indicating that such money was payable in this state. (Id.)

3. **TERMS OF NOTE CONCLUSIVE—ORAL EVIDENCE INADMISSIBLE.**—Where by its terms a note made out of this state is legally presumed to be payable out of the state, the parties are concluded by the legal terms of their contract, whenever the attachment laws of this state are invoked, and oral evidence to vary the legal terms of the contract is inadmissible. (Id.)
4. **REFUSAL TO DISSOLVE ATTACHMENT—IMPLIED FINDING—ABSENCE OF CONFLICT—REVERSAL.**—Where an order denying a motion to dissolve an attachment upon a note made out of this state rests upon an implied finding that it was payable in this state, based upon illegal oral evidence as to the place of payment, contrary to the legal terms of the note, no question of conflict arises upon such evidence, and the order must be reversed. (Id.)
5. **AFFIDAVIT NOT SIGNED.**—To justify the issuance of a writ of attachment, there must be received by the clerk an affidavit by or on behalf of the plaintiff; but it is not necessary that the affidavit be signed by the party making it. (Fairbanks, Morse Co. v. Getchell, 458.)
6. **IRREGULAR AFFIDAVIT—PERJURY—AUTHORITY OF NOTARY ESSENTIAL.**—It is no defense to a prosecution for perjury, upon an affidavit for attachment, that the oath was taken or administered in an irregular manner; nevertheless, the document which purports to be sworn to is not an affidavit, unless the notary had authority at the time to administer the oath. (Id.)
7. **NOTARY'S AUTHORITY CONFINED TO COUNTY OF APPOINTMENT.**—In the absence of statutory regulation providing otherwise, the rule is that a notary cannot act as such official outside of the county for which he is appointed. There is no provision in the codes of this state which can be construed as authorizing a notary to administer an oath outside of his county; but their provisions are inconsistent with such authority. (Id.)
8. **NO AUTHORITY TO TAKE OATH OVER TELEPHONE OUTSIDE OF COUNTY.**—Assuming, without deciding, that an oath may be administered and the obligations thereof assumed by communication had over the telephone, the validity of such act must be held to apply only where both notary and affiant are within the territorial limits for which the notary has been appointed and commissioned. No authority exists in a notary commissioned for one county to take the oath of a person in another county by telephone, however familiar his voice may be to the notary. (Id.)
9. **VOID AFFIDAVIT FOR ATTACHMENT TAKEN OUT OF COUNTY.**—Where an affidavit for attachment to be used in Kern county was admin-

ATTACHMENT (Continued).

istered by a notary of that county to an affiant in Los Angeles county, the act of administering the oath to him was a nullity, and the purported affidavit upon which the attachment was issued was void and of no effect. (Id.)

10. **AMENDABILITY OF AFFIDAVIT—CHANGE IN CODE—IRREGULARITY—VOID AFFIDAVIT NOT AMENDABLE.**—Prior to the amendment of 1909 to section 558 of the Code of Civil Procedure, no affidavit for attachment could be amended. But the changed law contemplates the existence of an irregular affidavit susceptible of amendment; and when the act of the notary in administering the oath was a nullity, and the purported affidavit is void, there is nothing to amend. There can be no irregularity in that which had no existence. In such case, the code amendment is inapplicable. (Id.)
11. **CONSTRUCTION OF CHANGED LAW—DISTINCTION BETWEEN MANNER OF PERFORMANCE AND PREREQUISITE ACT.**—It is only where the manner of performing the act of taking the affidavit is irregular that amendability exists, under the changed law, to supply that which by reason of inadvertence or oversight was omitted from it. But the provision of the changed law cannot be construed as authorizing the filing of an affidavit in support of a writ of attachment before issued, in the absence of that which constitutes the substance of the act required as prerequisite to its issuance. (Id.)

ATTORNEY AT LAW.

1. **ACTION FOR LEGAL SERVICES—CONFLICT OF EVIDENCE—SUPPORT OF VERDICT.**—In an action for legal services, where the testimony of the plaintiff is corroborated, and there is conflicting evidence for the defendant, the verdict for the plaintiff is sufficiently sustained, and this court will not interfere therewith. (Aydelotte v. Bloom, 56.)
2. **PLEADING—REASONABLE VALUE OF SERVICES—EVIDENCE OF RETAINING FEE.**—Under a general complaint to recover the reasonable value of plaintiff's services as an attorney at law, evidence is admissible, without special pleading thereof, to prove the amount of a reasonable retaining fee. (Id.)
3. **RETAINER PART OF CAUSE OF ACTION.**—Where an action is brought to recover the value of an attorney's services, the retainer, if not paid, constitutes part of the plaintiff's cause of action; and it is not necessary to set forth the items of the account in the complaint. It is sufficient to state the facts constituting the cause of action in ordinary and concise language. (Id.)
4. **BILL OF PARTICULARS.**—Where, upon a demand for a bill of particulars, one was furnished setting forth detailed items for disbursements, and one lumping charge for the whole of the legal services, and no further bill of particulars was demanded, it was

ATTORNEY AT LAW (Continued).

competent in proving the value of the services to prove the amount of a reasonable retaining fee. (Id.)

See Appeal, 13; Criminal Law, 12-16.

BANK. See Assignment; Community Property, 2, 3.

BANKRUPTCY. See Lease, 5-7.

BILL OF EXCEPTIONS. See New Trial, 3-5.

BILL OF PARTICULARS. See Attorney at Law, 4.

BOUNDARY.

1. **PURCHASE OF RECORD TITLE—GENERAL RULE.**—As a general rule, where the vendor of land is in the apparent possession thereof, a purchaser of it, finding the title of record in the vendor, is put upon no further inquiry. (Campbell v. Grennan, 481.)
2. **EXCEPTION—KNOWLEDGE OF POSITION OF HOUSES—PURCHASE SUBJECT TO OCCUPATION BY DEFENDANTS' HOUSE.**—Such general rule does not apply where the purchaser knew the land for many years, and that defendants' house stood eighteen inches over the line, and that the house of the common predecessor of plaintiff and defendants stood partly over on defendants' land. The moral and legal duty was cast upon plaintiff, as purchaser, to inquire as to these patent and obtrusive facts; and his purchase of the land on which defendants' house stood was with notice thereof, and subject thereto. (Id.)
3. **AGREED OCCUPATION—DIVISION LINE—FACTS PUTTING PURCHASER UPON INQUIRY.**—Where the owner of the whole lot sold the east half to defendants, and they agreed upon a division line, and defendants' house abutted thereon, and the owner's house in the rear standing on the west half stood partly on the east half, and so remained till her death, and the subsequent purchaser of the west half knew all of the facts, other than the agreement, they were of such a character as to excite the suspicion of a prudent man dealing with the property that some agreement not disclosed by the record was made by the parties owning the lot. (Id.)
4. **INEQUITY OF EJECTMENT—SERIOUS INJURY TO DEFENDANTS' HOUSE.** It would be manifestly unjust and inequitable, in view of plaintiff's knowledge of the open and notorious and exclusive occupation of the land on which defendants' house stood for five years, to eject them from such occupation, to the serious injury of defendants' house. (Id.)
5. **PRESUMPTION OF PURCHASE IN VIEW OF POSSESSION.**—With the knowledge possessed by plaintiff, it must be presumed that he pur-

BOUNDARY (Continued).

chased the west half of the lot in view of the defendants' possession by means of their house, to the extent of its occupation thereof. (Id.)

6. **LAND OCCUPIED BY BUILDINGS TO AGREED LINE—PRESUMPTION AS TO PURCHASE.**—Where land is occupied by buildings to an agreed line, the grantee is presumed to have bought the property with a view to the boundaries visibly marked on the ground, and to have relied thereon, and fixed the price according to the value of the property as thus defined and used. (Id.)
7. **PRINCIPLES OF EQUITY AND FAIR DEALING.**—Under the circumstance shown by the evidence, it would be opposed to the principles of equity and fair dealing recognized by the authorities to give effect to the bare legal title, to the extent of depriving the respondents of a right honestly acquired and continuously exercised within the observation of appellant. (Id.)

BROKER. See Contract, 30–39.

BURNING HAY STACKS. See Criminal Law, 58–64.

CERTIORARI. See Criminal Law, 5; Eminent Domain, 18; Estates of Deceased Persons, 7; Justice's Court; Protection District.

COMMUNITY PROPERTY.

1. **PROPERTY ACQUIRED AFTER MARRIAGE—PRESUMPTION OF COMMUNITY PROPERTY.**—All property acquired after marriage is presumed to be community property in the absence of evidence showing that it was acquired by gift, bequest, devise or descent. (Lynam v. Vorwerk, 507.)
2. **POSSESSION OF MONEY AFTER MARRIAGE—JOINT DEPOSIT IN SAVINGS BANK—PRESUMPTIONS APPLICABLE.**—Where money was in the possession of the husband and wife, long after their marriage, and it was jointly deposited by them in a savings bank, such possession and deposit raises the presumptions that the property was acquired after marriage and that it was community property, in the absence of any proof to the contrary. (Id.)
3. **PROPERTY RELATION OF HUSBAND AND WIFE—QUASI PARTNERSHIP.**—The relation of husband and wife as to their property is somewhat in the nature of a partnership, where there is usually partnership property and the separate property of the copartners. (Id.)
4. **PRESUMPTION OF PARTNERSHIP PROPERTY—DEPOSIT IN JOINT NAMES.**—If the partners should jointly go to a bank and deposit money in their joint names, it seems, in the absence of other evidence, that the money was the joint money of such copartners, and

COMMUNITY PROPERTY (Continued).

that it being in their possession, as such, it would be presumed to have been acquired by the copartnership. (Id.)

5. MONEY DEPOSITED AFTER MARRIAGE—BURDEN OF PROOF—CONCLUSIVE PRESUMPTION.—Where money was deposited in bank after marriage by husband and wife, in their joint names, the burden of proof is upon the wife, or her representatives, to show that she had a separate interest therein, and in the absence of such proof, the presumption that it was community property is absolute and conclusive. (Id.)

6. JOINT TENANCY NOT CREATED BY JOINT WRITTEN DEPOSIT.—The writing given to the bank showing that the deposit was in their joint names payable to either on the return of the book did not have the effect to create a joint tenancy in the husband and wife, with right of survivorship. (Id.)

7. JOINT INTEREST MUST BE EXPRESSLY DECLARED.—Under section 683 of the Civil Code, it is provided that "a joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy." (Id.)

8. NATURE OF WRITING—MERE AUTHORITY TO BANK TO PAY TO HOLDER OF BANK-BOOK.—The joint writing given to the savings bank was merely an authority given to it to pay the amount of the deposit to either party on surrender of the pass-book. It did not create a joint right in favor of the husband and wife to the moneys, nor can it be presumed to be joint, under section 1431 of the Civil Code, which has no application to the facts. (Id.)

CONSTITUTIONAL LAW. See Dentists, 2; Juvenile Court, 3; Mechanics' Liens, 13; Schools, 2.

CONTRACT.

1. ACTION FOR REASONABLE VALUE OF SERVICES—DEFENSE OF SPECIAL CONTRACT—SUPPORT OF FINDINGS.—In an action to recover the reasonable value of work and labor performed by plaintiff as a civil engineer, at defendants' instance and request, in which the answer denied any amount due, and pleaded a special contract in defense, and in which the evidence tends to show that plaintiff rendered such services as engineer to defendants at their request for two hundred days of the fair value of \$15 per day; that there was no agreement limiting the cost of the work; that no payments had been made upon those services, and that all payments made were on account of expenses incident to the employment, it is held that such evidence is sufficient to support the findings for the plaintiff, notwithstanding evidence for defendant to the contrary. (Pearson v. Hendrick, 732.)

CONTRACT (Continued).

2. **OPINION OF PLAINTIFF AS TO VALUE BASED OF PERCENTAGE IMMATERIAL—VALUE OF SERVICES OTHERWISE SHOWN.**—The findings for plaintiff being established by sufficient evidence, the fact shown by the record that plaintiff founded his opinion as to the value of his services on a percentage basis is immaterial, since if plaintiff's evidence as to the value of his own services be ignored, such value is established for the plaintiff by independent evidence. (Id.)
3. **PRESSENTATION OF CLAIM FOR SMALLER SUM—CLAIM FOR FAIR VALUE NOT PRECLUDED.**—Though it is disclosed by the record that when plaintiff first presented his bill it was for a smaller amount, yet this would not preclude plaintiff from asserting a claim for the fair value of the services. (Id.)
4. **CONTRACT TO CONSTRUCT AND INSTALL ELECTRICAL PLANT—NONPERFORMANCE AND DELAY — PAYMENT IN FULL — WAIVER OF COUNTERCLAIM—SUPPORT OF FINDINGS.**—In an action to recover an alleged balance due on a contract to construct and install an electric lighting and heating plant, where defendant denied any balance due, and counterclaimed damages for nonperformance and delay in performance, and the court found for defendant as to any balance due, and found that defendant paid plaintiff in full for the plant, with full knowledge of the facts on which the counterclaim was based, and found against defendant on the counterclaim, and that such counterclaim was waived, it is held that the evidence in the record sustains such findings. (Sirch Electrical etc. Laboratories v. Garbutt, 435.
5. **WORK DONE UNDER DEFENDANT'S INSTRUCTIONS—PAYMENTS MADE AS WORK PROGRESSED—SUPPORT OF FINDING—FULL PAYMENT WITH KNOWLEDGE.**—Where it appears that the work was done by plaintiff's agent under defendant's instructions, between April and December, 1907, and that the work was paid for as it progressed in fourteen checks running from April 29, 1907, to December 31, 1907, thus completing payment in full, the evidence fully sustains the finding that full payment was made with full knowledge of all the facts on which the counterclaim was based. It was not necessary that the entire work should be completed before there could be an acceptance of and payment for any part of the work by defendant. (Id.)
6. **LATER MUTUAL CHARGES OF BAD FAITH.**—The fact that later correspondence between the parties contained mutual charges of misrepresentation and bad faith, made by each to the other, is not evidence that defendant did not accept and pay for the entire work done by plaintiff. (Id.)
7. **DECISION AS TO WAIVER OF CLAIM FOR DAMAGES NOT AGAINST LAW.** The decision that there was a waiver of the claim for damages is not against law. The defendant, who, with full knowledge of all

CONTRACT (Continued).

- the defects in the work, accepted and paid for it, thereby waived his claim for damages. (Id.)
8. **COMMON COUNT NOT INVOLVED—EXTINCTION OF OBLIGATION FOR BREACH OF CONTRACT—ACCORD AND SATISFACTION.**—There is no common count in the complaint. The case is one in which the court has found that goods and labor, to a certain value, had been furnished under the contract, and so accepted by the defendant. There has been an extinction of the obligation of plaintiff to make good the breach of the contract of which it was guilty by an acceptance of the work by the defendant, which is in the nature of an accord and satisfaction. (Id.)
 9. **GROUND FOR RETENTION BY PLAINTIFF OF DEFENDANT'S MONEY.**—The court did not recognize plaintiff's right to retain the money received from defendant, on the ground that the goods furnished and services rendered were reasonably worth that amount, but because defendant accepted them in compliance with the contract, and paid that amount for them. (Id.)
 10. **ALL GROUNDS OF DAMAGE NEGATIVED BY FINDINGS.**—It is held that all the grounds of damage set up in the counterclaim were negatived by the findings of the court. (Id.)
 11. **REFUSAL TO ACCEPT PERFORMANCE.**—A refusal to accept performance of a contract before the arrival of the time for performance is the equivalent of a refusal to perform, if not withdrawn before the time for performance. (Howard v. Galbraith, 373.)
 12. **CONTRACT TO REPURCHASE STOCK—SUPPORT OF FINDINGS—EXCUSE FOR TENDER AND DEMAND.**—A contract to repurchase stock at the expiration of a year from the date of purchase is valid. But the support of findings showing the want of ability or disposition of defendant to perform the contract, and the equivalent of his refusal to perform the same, not withdrawn before the expiration of the year, establishes a legal excuse for exact tender and demand for performance by the plaintiff. (Id.)
 13. **DEMAND BY TELEPHONE BEFORE EXPIRATION OF YEAR—DECLARED INABILITY.**—Where the plaintiff made demand by telephone, a short time prior to the expiration of the year, in reply to which defendant declared his inability to perform, and stated that he was not in position to comply with his contract to repurchase the stock, even if the exact limitation of one year from the date of the contract is to be considered, the variance would be immaterial, in view of the answer of defendant to the telephone notice by plaintiff disclosing a refusal of defendant to perform. (Id.)
 14. **LEGAL EQUIVALENT OF DEMAND AND REFUSAL—RELEASE FROM REQUIREMENT.**—The answer to such notice shows the legal equivalent of a demand for performance by the plaintiff and the refusal of

CONTRACT (Continued).

performance by the defendant, and the release of the plaintiff from any further obligation to make demand. (Id.)

15. **BURDEN UPON DEFENDANT.**—If the defendant wished to hold the plaintiff to exact performance, the burden is upon him to express a willingness to carry out the contract. (Id.)
16. **STOCK PURCHASED AS AN INVESTMENT—REPRESENTATIONS BY DEFENDANT—CONTRACT TO REPURCHASE.**—*Held*, that the contract between the parties was, in effect, that plaintiff purchased the stock as an investment upon the representations by defendant that it was a good investment, and that defendant agreed that if plaintiff was not satisfied with the investment after a year had elapsed, he would purchase the stock and take it off his hands at the price paid. (Id.)
17. **PLAINTIFF'S CAUSE OF ACTION—LAPSE OF YEAR—NOTICE OF DESIRE TO SELL.**—In such case plaintiff had no cause of action against the defendant until he awaited the passage of the year and then notified defendant that he desired to sell the stock. (Id.)
18. **RIGHT OF ACTION NOT PREJUDICED BY NEW DEMAND AFTER YEAR AND NOTICE OF DESIRE TO SELL.**—Plaintiff did not prejudice his right of action by renewing his demand after the year, and notifying defendant that he desired to sell the stock, notwithstanding defendant's previous declaration of inability to perform. The renewal of the notice and demand was not an offer of performance after a specified time fixed therefor, within section 1490 of the Civil Code, but was a further notice and demand, after the default of defendant upon which to predicate his action. (Id.)
19. **DEFENDANT NOT IN DEFAULT WITHOUT NOTICE OF DESIRE TO SELL AFTER YEAR—REASONABLE TIME.**—The defendant was not in default until plaintiff notified him of his desire to sell after the year expired. This he might do within a reasonable time thereafter. (Id.)
20. **SUPPORT OF FINDINGS—REPRESENTATIONS OF DEFENDANT INDUCING PURCHASE—RELIANCE UPON PROMISE TO REPURCHASE.**—Though the evidence was curtailed, there was sufficient evidence to support the findings that plaintiff's purchase of the stock was induced by representations made by the defendant, and that plaintiff relied upon the promise and agreement of defendant and was induced thereby to purchase the stock. (Id.)
21. **CURTAILING OF EVIDENCE CAUSED BY LETTER OF DEFENDANT AGREEING TO PURCHASE—APPELLANT NOT PREJUDICED.**—Where the curtailing of the evidence was caused by confining it after the date of a letter by defendant agreeing to purchase, the defendant appealing could not be surprised or misled by the ruling of the court, and no prejudice to him therefrom can be presumed. (Id.)

CONTRACT (Continued).

- 22. BUILDING CONTRACT—ORAL MODIFICATION—REFUSAL OF OWNER TO MAKE PAYMENTS AGREED—TERMINATION—QUANTUM MERUIT.—**Where a building contract was orally modified by agreement of the parties, extending the time for completion, and providing for more frequent payments, and the court found that the owner neither complied with the contract nor with the oral modification as to payments, and that the contractors continued the work until by reason of the failure of the owner to make such payments, they considered and treated the contract as terminated, and refused to continue the prosecution of the work, these facts, if true, clearly justified the contractors in such course, and entitled their assignee to recover upon *quantum meruit* the reasonable value of the work theretofore done and materials furnished. (Beck v. Schmidt, 448.)
- 23. SUPPORT OF FINDINGS—WRITTEN CONTRACT NOT PART OF RECORD.—**Where the written contract was introduced in evidence, but is not made part of the record, nor its contents shown therein, it cannot be said that the evidence was insufficient to sustain the findings that the owner did not comply with the written contract as to payments, and that the plaintiff complied with the contract on their part until prevented by such noncompliance. (Id.)
- 24. EVIDENCE—SUPPORTING ORAL MODIFICATION.—**The evidence in the record supports the finding as to a subsequent modification of the contract agreeing to weekly payments sufficient to meet the payrolls of the men employed and in furnishing materials therefor, and also extending the time for performance of the work. But the written contract not being in the record, it cannot be said that the time of performance fixed therein did not fix a date subsequent to the cessation of the work for nonpayments agreed upon. (Id.)
- 25. EVIDENCE SUPPORTING ARREARS OF PAYMENT.—**The evidence tends to prove that defendant was in arrears of payment practically from the commencement of the work, and that defendant quit the work for persistent refusal of defendant to make the payments agreed upon during a period of three months. (Id.)
- 26. EFFECT OF ABSENCE OF CONTRACT.—**In the absence of the written contract or any evidence as to its terms and provisions, it cannot be said that any of the findings complained of are not supported by the evidence. Even if it be conceded that the finding as to the oral modification thereof was unsustainable, it would be harmless, in view of the finding that defendant failed to comply with the written contract, and that defendant did not comply with it on his part until, owing to its breach, the contractors ceased work. (Id.)
- 27. NONSUIT PROPERLY DENIED.—**The court properly denied defendant's motion for a nonsuit of the plaintiffs in the view of the evidence before the court. (Id.)
- 28. RULINGS UPON EVIDENCE—ERROR NOT SHOWN.—**Assignments of error in rulings upon evidence as to damages resulting from failure

CONTRACT (Continued).

of the contractors to complete the work within the time specified cannot be considered, where there is nothing in the record upon which it can be determined that the court erred in making such rulings. (Id.)

29. **PLEADING—NONPAYMENT—AMOUNT “DUE AND OWING.”**—Where the complaint formally and in direct terms alleged nonpayment of the demand of the contractors sued for, the objection that it does not also allege that the amount is “due and owing” is untenable. No good purpose could be subserved by inserting words constituting a mere legal conclusion, from the use of which, at most, and then only in the absence of demurrer, the fact of nonpayment alleged might be implied. (Id.)
30. **ACTION BY BROKER—BREACH OF WRITTEN CONTRACT OF SALE—FINDING—SUBSTITUTION OF ORAL CONTRACT—SALE AT AUCTION NOT EFFECTED.**—In an action by a real estate broker to recover damages for breach of a written contract to pay one-third of all profit from a sale of land at \$19,000 for which \$16,250 had been paid, on account of prevention by the owner of an auction sale for \$20,400, a recovery cannot be had, where the court finds upon sufficient evidence that the written contract was superseded by the oral contract of the parties for a sale of the land at auction by the broker at his own expense, at which the owner was to receive \$21,000, and the broker was to receive all above that sum, which might prove more profitable to him, it being expressly agreed that if \$21,000 was not realized, all sales were to be declared off, which was done, with the effect that no purchaser was obtained or sale effected. (Simmonds v. Sweeney, 283.)
31. **RESCISSION—NOVATION.**—The evidence sustains a rescission of the written agreement, and the substitution of the parol contract; or, in other words, it shows a clear case of novation, which, under section 1530 of the Civil Code, is “the substitution of a new obligation for an existing one.” (Id.)
32. **CONSTRUCTION OF EVIDENCE UNDER FINDING—QUESTION OF FACT FOR TRIAL COURT.**—Under the construction that this court is bound to place upon the evidence, it is incontrovertible that, after the execution of the written contract, and before any services were performed under its terms, the parties thereto entered into an entirely different parol agreement respecting the same subject matter; and it is a question of fact for the trial court to determine from all the facts and circumstances whether the parol agreement was intended to be substituted for the written agreement, and whether the subsequent conduct in attempting to sell the property is referable to the parol agreement. (Id.)
33. **INCONSISTENCY OF TERMS OF CONTRACTS—ANNULMENT OF WRITTEN CONTRACT—LOSS OF COMPENSATION.**—The terms of the two con-

CONTRACT (Continued).

tracts were entirely inconsistent, and could not be operative at the same time. It is reasonable to conclude that the written contract was annulled by consent, and that, since appellant failed to sell the property for the agreed sum, he was entitled to no compensation. (Id.)

34. ELECTION BY APPELLANT—LOSS OF RIGHTS AND OBLIGATIONS UNDER WRITTEN CONTRACT.—If appellant intended to rely upon the written contract, he should have declined to accept and act upon the proposition subsequently submitted to him by respondent. He was called upon to exercise his election, and he chose to take his chances of a larger compensation under the second parol arrangement; and by accepting respondent's new proposal and subsequently acting thereon, the rescission of the first contract was entirely consummated, and it was then too late for him to seek a revival of the privileges and obligations of the written contract. (Id.)

35. FREEDOM OF CHOICE—ABSENCE OF MENACE OR DURESS.—There was no interference with the freedom of the appellant's choice by the statement that in the proposed auction sale, respondent must have \$21,000 as her share, or there would be no sale; such a declaration did not amount to menace or duress, where nothing else appears calculated to inspire fear in the mind of appellant or to influence unduly his judgment. The mere threat to withhold from a party a legal right which he has an adequate remedy to enforce is not, in the eyes of the law, duress. (Id.)

36. CONSIDERATION OF NEW AGREEMENT—MISTAKE OF JUDGMENT.—The new agreement was supported by a sufficient consideration in the right given to appellant to retain whatever was received for the property in excess of \$21,000, by which it was believed that he would be amply compensated. The fact that subsequent events proved the parties to be mistaken in their judgment does not affect the question of compensation. (Id.)

37. PAROL AGREEMENT NOT WITHIN STATUTE OF FRAUDS.—The parol agreement, having become entirely executed, was not within the statute of frauds, as purporting to transfer an interest in real property. Under section 1661 of the Civil Code, "an executed contract is one the object of which was fully performed." (Id.)

38. SUPPOSITION OF INVALIDITY OF PAROL AGREEMENT—PURCHASER NOT FOUND UNDER WRITTEN AGREEMENT.—Upon the supposition of the invalidity of the parol agreement, and the continuance of the written agreement in force, there can be no recovery thereunder, for the reason that the broker has failed to prove that he obtained a purchaser for the property, ready and willing to make the purchase in accordance with the terms imposed by the seller. (Id.)

39. DUTY OF BROKER NOT PERFORMED—DISMISSAL OF PROSPECTIVE BUYER.—It cannot be said that the duty of the broker has been

CONTRACT (Continued).

performed, when, by his own act, he has dismissed the prospective buyer and acquitted him of any connection with the transaction and of any obligation to purchase. (Id.)

40. **ACTION FOR GOODS SOLD—CREDITS OF LUMBER—SALE OF LUMBER BUSINESS—OPTION—EXECUTORY CONTRACT—PAROL EVIDENCE—INADMISSIBLE HEARSAY.**—In an action for a balance of goods sold for supplies to defendant as a lumber manufacturer, whose lumber was delivered to plaintiff and credited on the account, in which it appears that subsequently defendant, in consideration of ten dollars paid by one Roach, and further payments to be made by him, signed a unilateral contract to sell to him all of his timber and mill business, whether such contract was an option as testified by Roach, or an executory contract of sale as claimed by defendant, and conceding that the contract was so ambiguous as to justify parol evidence to explain it, yet it was prejudicially erroneous to admit hearsay declarations of Roach made after the execution of the contract, and not made in the presence of either party, that he had bought the timber and mill property and was the owner thereof. (Northwestern Redwood Co. v. Dicken, 689.)
41. **SUPPOSITION OF EXECUTORY CONTRACT—OPERATION OF MILL.**—If the transaction amounted to an executory contract of sale of the mill and timber on defendant's land, with the right to operate the mill pending final sale, Roach alone would be responsible for all supplies received while he operated the mill, and would be entitled to all credits for lumber delivered by him to plaintiff during such operation. (Id.)
42. **SUPPOSITION OF OPTION—AGENCY FOR OWNER.**—If the transaction was an option on the part of defendant to sell to Roach, and the latter assumed control and management of the property for defendant, then, in the absence of any other agreement to the contrary, defendant continued to be responsible for all supplies furnished to the mill, necessary for its operation, and was entitled to credits of all timber delivered to plaintiff by Roach during the period in which he operated the mill as agent for defendant. (Id.)
43. **DECLARATIONS BY ONE NOT A PARTY ADMISSIBLE ONLY FOR IMPEACHMENT.**—Declarations made by Roach, who was not a party to the action, and not made in the presence of either party, after the consummation of the transaction, that he had bought the mill and lumber business, constituted the plainest kind of hearsay testimony, and could prove admissible under no conceivable theory, except, after proper foundation laid, for the purpose of impeaching Roach as a witness. Proof of such declarations could not constitute affirmative or independent evidence contradictory to the testimony of Roach. (Id.)

CONTRACT (Continued).

44. **DECLARATIONS NOT PART OF RES GESTAE.**—The declarations were not admissible as part of the *res gestae*, after the execution of the contract, whether it be regarded as an option upon consideration conferring a right, or an executory contract of purchase and sale. The fact that a final transfer of the property had not taken place when the declarations were made would not extend the agreement to sell and buy, so as to make the declarations admissible as part of the *res gestae*. (Id.)
45. **GENERAL RULE AS TO RES GESTAE.**—Where the intention of the parties to a written contract is rendered obscure by the ambiguity of the language in which its terms are expressed, evidence of the declarations of the parties to the contract, or either of them, made contemporaneously with the negotiation and executions of the agreement, if explanatory of the purpose and intent of the same, would be admissible as part of the transaction, or *res gestae*. (Id.)
46. **NARRATIVE OF PAST EVENT NOT BINDING—HEARSAY.**—Declarations made by one of the parties to the contract, not made in the presence of either of the parties to the action, but made after the transaction evidenced by the contract had been fully completed, are a mere narrative of a past event, and would constitute mere hearsay testimony, which would be inadmissible in an action between other parties; and by no known rule of law are declarations thus made binding upon a stranger to the transaction. (Id.)
47. **NARRATIVE DECLARATIONS NOT ADMISSIBLE UNDER CODE PROVISIONS.**—Such narrative declarations of one not a party to the action are not admissible, as "*prima facie* evidence," within section 1851 of the Code of Civil Procedure, or as "part of an act, declaration, conversation or writing which had been given in evidence," within section 1854 thereof, nor as a declaration "against interest," within the purview of any section of that code. (Id.)
48. **INSTRUMENT PRIMA FACIE A MERE OPTION—PREJUDICIAL CHARACTER OF DECLARATIONS BEYOND DOUBT.**—The instrument which is the main subject of this controversy, is held to appear from its language to be nothing more than a mere option, involving only the bestowal of the right to accept or reject within a certain time the offer therein contained to buy the property mentioned at the price named, and that it could not appear otherwise without parol evidence. The court recognized this necessity to overcome the legal effect of the transaction as shown by the writing; and was, beyond doubt, prejudicially influenced to a great extent by the improperly admitted declarations made by the holder of the option, not a party to the action, after the transaction was consummated, in construing its language as an executory contract of sale, instead of an option. (Id.)

CONTRACT (Continued).

- 49. IMPROPERLY ADMITTED EVIDENCE PREJUDICIAL.**—Even if some of the language in the instrument would lend color to the construction given by the trial court, the improperly admitted evidence of such declarations must nevertheless be held prejudicial. If improper evidence has been admitted, it is sufficient to require a reversal that it may have turned the scale and lost the case to appellants. This must of necessity be the rule wherever evidence has been admitted which tends in any degree to affect the final conclusion of the court. (Id.)

See Agency; Assignment; Attachment, 1-4; Corporation, 1; Lease; Promissory Note, 1; Sale; Specific Performance; Vendor and Vendee.

CORPORATION.

- 1. CONTRACT TO PURCHASE STOCK—FALSE REPRESENTATIONS AS TO INVENTION—RESCISSION—SUFFICIENT COMPLAINT.**—A complaint in an action to rescind a contract to purchase stock in a corporation, organized to manufacture patented mining machinery, and procure a return of real property conveyed in part payment, which alleges a contract between plaintiff and defendant F. J. Hoyt to purchase the stock for \$5,000, and to accept a conveyance made by plaintiff to his wife, A. M. Hoyt, at his request, in part payment of \$3,000, and to give her note to F. J. Hoyt for the residue, and that to induce such purchase and conveyance, F. J. Hoyt represented to plaintiff that the patented machine, which was practically the sole asset of the corporation, would economically abstract the finest particles of flour gold, and was a perfected machine, which representations induced the purchase, and that they were false and untrue, and that plaintiff relied wholly thereupon, states a cause of action. (Sheer v. Hoyt, 662.)
- 2. MISREPRESENTATIONS OF FACT.**—The allegation that misrepresentations were made as to the character of the assets of the corporation and the mechanical fitness and productive capacity of the machine, which constitutes the sole means of income, must be regarded as alleging more than a mere opinion as to the value of an invention or the market value of the stock of the corporation. The representations made were not statements of what the machine in question might be expected to do, but of things which it had done and was capable of doing. (Id.)
- 3. MATTERS OF OPINION STATED AS FACTS.**—Matters which might otherwise be only expressions of opinion, when stated as accomplished facts by one of the parties to a contract, and accepted and relied upon by the other as such, may, and often do, become the basis of actions for fraudulent misrepresentations. (Id.)
- 4. CONVEYANCE OF LAND TO DEFENDANT'S WIFE—FALSE REPRESENTATIONS OF HUSBAND—WIFE NOT PROTECTED AS VENDEE.**—The convey-

CORPORATION (Continued).

ance of the land by plaintiff to defendant's wife, under the circumstances appearing, does not entitle her to the rights of a *bona fide* purchaser, or justify her in retaining property obtained from plaintiff by the fraudulent representations of her husband. She was bound by her husband's acts and representations in making the sale of the stock. She was not a purchaser from her husband as vendee, and the court found, upon sufficient evidence, that she held the title in trust for her husband as vendee of the land, accepted in part payment of the stock purchased of him by plaintiff. (Id.)

5. ADMISSIONS OF ANSWER—CONSIDERATION FROM WIFE NOT AVERRED.

The answer admits that the conveyance was made to defendant's wife by virtue of the transactions connected with the sale of the stock, and pursuant to the agreement to convey the property to the husband in part payment for the stock, and it nowhere appears in the pleadings that there was any consideration moving from her for such conveyance. (Id.)

6. FINDINGS FOR PLAINTIFF SUPPORTED BY EVIDENCE.—Held, that the findings for the plaintiff as to the falsity of the representations made by the seller of the stock, and that plaintiff relied thereupon in making the purchase thereof, are sufficiently supported by the evidence. (Id.)**7. IMPROPER EVIDENCE—THEORETICAL PERFECTION OF MACHINE.—**

When a witness called for defendants had testified, in his direct examination, that the machine was defective in certain respects, the court did not prejudicially err in sustaining an objection to a question whether or not, considering the principle on which the machine was constructed, he considered the machine a perfect one when he first saw it. The answer called for covered no issue. The representation was that it was a perfected machine, as a matter of practical demonstration, and not that it was theoretically perfect, although mechanically a failure. (Id.)

8. INDORSEMENT OF NOTE TO BANK BY GENERAL MANAGER AND SECRETARY—SEAL AND RESOLUTION NOT ESSENTIAL.—The possession by a bank of a note indorsed to it for value before maturity by a corporation payee, signed by its vice-president and secretary, together with uncontradicted evidence that the vice-president was its general manager, with full control of its business, and that it was the custom of the corporation to sell its notes to banks, was sufficient to show that the indorsement to the bank was in the usual course of business; and from these facts the necessary authority to indorse the note will be inferred, notwithstanding the absence of the seal of the corporation and the failure to prove a formal resolution of the directors confirming it. (Ramboz v. Stansbury, 649.)**9. PRESUMPTION OF RIGHT ACTION BY CORPORATION.—**Under the operation of the presumption of right action in dealing with negotiable securities, an assignment by a corporation of a note held by it is

CORPORATION (Continued).

presumed to be valid until the contrary appears, and the force of the presumption in favor of its general power to assign such instruments is that its officers exercised the power rightly in the particular instance, or in the ordinary course of its business. In the absence of any evidence to the contrary, the holder of the note of a corporation, under its indorsement by its officers, will be presumed to be the owner thereof. (Id.)

10. **PRIMA FACIE TITLE NOT REBUTTABLE BY MAKERS.**—The general rule appears to be that, in the absence of *mala fides*, the plaintiff's *prima facie* title to the indorsed note of a corporation, by reason of possession, is not subject to rebuttal in an action against the makers, so long as they are protected from further claim by payment of the judgment recovered against them. (Id.)
11. **FORECLOSURE OF PLEDGED STOCK—INTEREST OF BANK BY INDORSEMENT—AGENCY OR TRUST OF PAYEE—SUPPORT OF FINDING.**—In an action by a collector for the bank to foreclose stock pledged by the makers of the note to the payee, and to obtain judgment for the residue, in which the findings and judgment were for the plaintiff, it is immaterial whether there is any evidence to sustain a finding that the stock pledged was transferred to the bank, as none was necessary, since the indorsement and transfer of the note by the payee carried the collateral security with it. The right thereto existed in the indorsee, independent of actual delivery thereof, by virtue of being the holder of the note. If the payee, after selling the note, should continue to hold the collateral, he would hold it as agent or trustee for his assignee. (Id.)
12. **HARMLESS FINDING.**—If it be conceded that the transfer of the note was not sufficient evidence of the transfer of the collateral, nevertheless the finding of transfer thereof to the bank, if unsupported by the evidence, is harmless to the maker's appealing. (Id.)
13. **COUNTERCLAIM AGAINST PAYEE—INSUFFICIENT DEFENSE—NOTICE OF FACTS NOT SHOWN—EVIDENCE PROPERLY EXCLUDED.**—Where the answer set up a counterclaim against the payee of the note, alleging that it was given in settlement of an account, and that the amount thereof was, by mistake and inadvertence, \$2,700 in excess of the amount due, but failed to allege that the bank which paid the full face of the note before maturity had any notice of such fact, or that plaintiff took with any knowledge thereof, the court properly refused to allow proof thereof as a defense to the action. (Id.)
14. **GENERAL RULE AS TO WANT OR FAILURE OF CONSIDERATION—SPECIAL PLEADING—NOTICE TO ASSIGNEE.**—The general rule is that absence or failure of consideration is available as a defense to an action by an assignee of a note only by specially pleading it, and showing by additional allegations that the assignee is a holder with notice of the facts. (Id.)

CORPORATION (Continued).

15. **PARTIAL FAILURE OF CONSIDERATION—INSUFFICIENT PLEADING—NOTICE TO BANK NOT AVERRED—INADMISSIBLE EVIDENCE.**—In the absence of an allegation that the bank had notice of the facts set up in the pleading at the time when the note was transferred to it, a counterclaim based upon a partial failure of consideration constitutes no defense to the action, and evidence was inadmissible in support thereof. (Id.)
16. **AMENDMENT OF COMPLAINT TO CONFORM TO PROOFS—DISCRETION.**—After the evidence was closed, the court had discretion to permit an amendment to the complaint to conform to the proofs introduced upon the trial, without notice to the defendants, it being stipulated that the allegations of the amendment should be deemed denied. The subject matter of the amendment having been proved at the trial, it would have been idle to have required notice thereof to defendant; and the discretion in allowing it was not abused, especially where it clearly appears that in no event could the rights of defendants be prejudiced by the ruling. (Id.)
17. **JUDGMENT AGAINST FOREIGN CORPORATION—VOID SERVICE OF SUMMONS ON SECRETARY OF STATE—VACATION WITHIN REASONABLE TIME.**—The service of summons against a foreign corporation not doing business in this state cannot be made upon the Secretary of State, and a judgment against it by default, based upon such service, is void in fact, for want of jurisdiction over the person of the defendant, and may be vacated upon affidavit showing the facts within a reasonable time after the entry of the judgment. (George Frank Co. v. Leopold & Ferron Co., 59.)
18. **JUDGMENT VOID IN FACT—WANT OF JURISDICTION OF PERSON.—REASONABLE TIME NOT LIMITED BY CODE.**—A motion to vacate a judgment not void upon the face of the judgment-roll, but void in fact only for want of jurisdiction of the person of the defendant, is not limited as to a reasonable time within which to notice the same, by the terms of section 473 of the Code of Civil Procedure. The right to have a void judgment vacated exists independent of, and outside of, any statutory provision. (Id.)
19. **LIMIT OF TIME TO BE DETERMINED BY TRIAL COURT.**—While the court may vacate a judgment void upon its face at any time, and can only vacate a judgment merely void in fact, for want of jurisdiction over the defendant, within a reasonable time, yet the limit of such reasonable time, in the absence of a statutory provision, should be largely left to the determination of the trial court. (Id.)
20. **NOTICE SPECIFYING ENTRY OF JUDGMENT—SIX MONTHS—PRESUMPTION—BURDEN OF PROOF.**—Where the notice of the motion to vacate the judgment specified its *entry* within six months prior thereto, and the record shows nothing to the contrary, it must be

CORPORATION (Continued).

presumed against the appellant, upon whom the burden of showing error lies, and in support of the order vacating the judgment, that the entry of the judgment was within six months preceding such notice. (Id.)

21. RENDITION OF JUDGMENT—LAPSE OF SIX MONTHS AND ONE DAY —POWER OF COURT.—Where the judgment by default was rendered against the defendant by the judge signing the same, and the filing thereof with the clerk six months and one day prior to the notice of motion to vacate the judgment, as being void in fact, it cannot be held that such lapse of time after the rendition of the judgment, as distinguished from its entry, was unreasonable, or that the court had no power, under such circumstances, to vacate such judgment, upon proof *dehors* the record, that the court never obtained jurisdiction over the defendant. (Id.)

22. LIABILITY FOR TREES SOLD AND DELIVERED FOR ORCHARD—DIRECTION OF SECRETARY TO MANAGER OF ORCHARD—APPARENT AUTHORITY.—Where a corporation owning an orchard was accustomed to authorize the purchase of budded trees therefor by the direction of its secretary to the manager of the orchard, the secretary had apparent authority to represent the corporation, and it is liable for budded trees sold and delivered at such orchard by request of the manager upon such apparent authority of the secretary, and which upon his direction were planted and used in the orchard. (Eells v. Gray Bros. Crushed Rock Co., 33.)

23. ABSENCE OF FORMAL RESOLUTION BY DIRECTORS IMMATERIAL.—The fact that no formal resolution was passed by the board of directors of the corporation authorizing the secretary to give such orders for trees for the orchard through its manager is immaterial. No such resolution was necessary. (Id.)

24. APPARENT AUTHORITY—ESTOPPEL OF CORPORATION.—If a corporation clothes its officer or agent with apparent authority to act for it in a particular matter, it will be estopped to deny such authority as against persons dealing with such officer or agent in good faith, and in ignorance of any limitations upon his authority. (Id.)

25. STATUTORY LIABILITY OF STOCKHOLDERS.—The statutory liability of a stockholder of a corporation is not based merely upon his proportion of the issued stock of the corporation, but rests upon the proportion which the whole number of shares of stock subscribed and paid for by him, whether issued or not, bears to the whole number of shares of stock subscribed and paid for by other stockholders, whether issued or not at the time when the debt sued upon was created. (Hughes Mfg. etc. Co. v. Wilcox, 22.)

CORPORATION (Continued).

- 26. SUBSCRIPTION AND PAYMENT FOR UNISSUED STOCK—BONUS—EXECUTED AGREEMENT—OWNERSHIP OF STOCK.**—Where the directors of the corporation authorized the whole of the unissued stock to be subscribed and paid for by the stockholders, and agreed to a bonus of bonds, for which notes were afterward substituted by an executed agreement, and the whole of the stock was thus subscribed and paid for, and the subscription was deposited with the secretary for which the notes of the corporation were received, and the whole transaction was ratified by the directors, the subscribers became owners of the stock so subscribed and paid for, by such executed agreement. (Id.)
- 27. MODE OF BECOMING STOCKHOLDER—INFORMAL CONTRACT—BONDS WAIVED.**—No formal contract is required to constitute one a stockholder in a corporation. Any agreement by which a person shows his intention to become a stockholder is sufficient. In this case, if the original agreement be disregarded, payment for the stock and the voluntary acceptance of the bonds agreed upon in the form of notes executed and delivered by the corporation was clearly sufficient to constitute the defendant and his associates owners of the shares of stock to the extent of their respective subscriptions. The original condition for issuance of bonds was waived by the voluntary acceptance of the notes in lieu thereof. (Id.)
- 28. ABSENCE OF ENTRY OF SUBSCRIBED SHARES UPON BOOKS—OWNERSHIP NOT AFFECTED.**—The absence of the entry of the subscribed shares of stock formally upon the books of the corporation does not affect the ownership of the paid-up shares. (Id.)
- 29. STATUTORY LIABILITY NOT CONFINED TO ISSUED SHARES.**—The statutory liability of the stockholders of a corporation does not depend upon the shares of stock being formally recorded in the name of the owners. Such a position is contrary to section 3 of article XII of the state constitution, and to section 322 of the Civil Code, neither of which limits the liability of stockholders to those who appear on the books of the corporation to be such but include every equitable owner of stock. (Id.)
- 30. FAILURE OF CORPORATION TO PERFORM DUTY TO ISSUE SHARES—ABSENCE OF DUTY OF OWNER.**—The failure of the corporation to perform its duty to issue the shares paid for cannot be imputed to the owner of the stock, who has the right to assume that the proper book entries are made. No duty devolves upon the purchaser of stock from the corporation to see that not only his name, but the names of all other purchasers, together with the number of shares owned by them respectively, are entered in the books of the corporation. (Id.)
- 31. ABSENCE OF ESTOPPEL—LIABILITY UNAFFECTED.**—In the absence of facts constituting an estoppel, the liability of a stockholder is un-

CORPORATION (Continued).

affected by the neglect of duty of the corporation to enter his name upon its books. (Id.)

32. CONSTRUCTION OF STATUTE—"STOCKHOLDER" OR "OWNER."—The term "stockholder" or "owner," as used in the statute, is not confined to one who appears upon the books of the corporation as such, but to the real owner, notwithstanding the fact that the stock as shown on the books appears in the name of another. The apparent book owner may be also required to respond to a creditor, but his liability is based not upon ownership, but upon estoppel to deny ownership. (Id.)
33. RIGHT OF OWNER TO PROTECT HIMSELF FROM LIABILITY.—It being true that the creditor of a corporation may pursue the real owner of stock upon his statutory liability, the converse must also be true, that the real owner has the right to protect himself from statutory liability by showing the real ownership of shares of stock not appearing upon the books of the corporation in addition to those so appearing as a true basis upon which to diminish his liability. (Id.)
34. ISSUANCE OF SHARES IMMATERIAL.—Issuance of certificates of stock for stock subscribed and paid for is not necessary to constitute one a stockholder or owner of shares in a corporation. (Id.)
35. FAILURE OF MINUTES OF CORPORATION TO SHOW ACTION OF BOARD —PAROL EVIDENCE.—It is immaterial that the minutes of the corporation failed to disclose the action of the board. At most, the minutes of the proceedings of the board are *prima facie* evidence only of its acts. In the absence of a minute entry of its proceedings, they may be proved by parol evidence. (Id.)
36. AGREED STATEMENT OF FACTS.—It is sufficient that the agreed statement of facts upon which the case was submitted shows that the total amount of the capital stock of the corporation was subscribed and paid for, when the indebtedness sued upon was contracted, and that defendant owned 135 shares out of the \$100,000, instead of 105/530 of issued stock only as claimed by appellant. (Id.)

See Attachment, 1; Gas Company; Municipal Corporations; Practice, 1-3; Protection District; Reclamation District.

COSTS.

1. COMPLAINT IN SUPERIOR COURT FOR JURISDICTIONAL SUM—ISSUE—AGREED JUDGMENT FOR \$200—ERROR IN ALLOWING COSTS—REVERSAL OF ORDER.—Where the complaint in the superior court was to recover \$462, and the answer joined issue on the claim, and upon the offer of defendant to allow judgment for \$200, which was accepted by plaintiff, and the agreed judgment was entered upon the day set for trial, and the court allowed costs to plaintiff and denied defendant's motion to strike out his cost bill, it is held on

COSTS (Continued).

appeal from the order denying such motion that although the precise question does not appear to have been passed upon in this state, yet that the plaintiff, under the facts appearing, was not entitled to recover costs, and that the order appealed from must be reversed. (Murphy v. Casey, 781.)

2. **RECOVERY OF COSTS STATUTORY.**—There must be in any case some statutory warrant for the allowance of costs; and in the absence of a statute allowing costs, no costs can be recovered by either party. (Id.)
3. **CODE PROVISIONS LIMITING PLAINTIFF'S COSTS.**—Under subdivision 3 of section 1022 of the Code of Civil Procedure, costs are allowed to the plaintiff when he recovers \$300 or more; and section 1025 of that code declares, without qualification or exception, that "no costs can be allowed in any action for the recovery of money or damages where the plaintiff recovers less than \$300." These sections are not to be construed as applicable only to cases where the claim of the plaintiff is litigated, but construing them together with section 997 of that code, providing for a compromise judgment, if that is for less than \$300, costs are equally forbidden in such case by section 1025 thereof. (Id.)
4. **CLEAR INTENTION OF LEGISLATURE.**—It is very clear that it was the intention of the legislature to disallow costs in any case in which the judgment is for less than \$300, without regard to whether such judgment has been awarded after the issues involved have been actually tried, or is entered without trial by the agreement of the parties. (Id.)
5. **DISALLOWANCE OF COSTS IN NATURE OF PENALTY.**—The disallowance of costs when the recovery in the superior court is less than \$300 is in the nature of a penalty, and manifestly intended to discourage the bringing of actions in the superior courts which should be tried in justices' courts. (Id.)
6. **ACCEPTANCE OF OFFER BY PLAINTIFF—CONFESSION.**—The acceptance by the plaintiff of the offer by the defendant to allow judgment to be entered for less than \$300 was tantamount to a confession by plaintiff that the sum offered is as much as he could expect to obtain judgment for under the issue tried and litigated. (Id.)
7. **CONSTRUCTION OF SECTION 997.**—That part of section 997 of the Code of Civil Procedure which provides that if a plaintiff fails to obtain a more favorable judgment than that involved in an offer of compromise, he cannot recover costs, simply and clearly means that even if, after the refusal of the offer, he should recover a judgment within the superior court's jurisdiction, but less than the amount offered, he would not be entitled to costs. (Id.)

COURTS. See Justice's Court; Juvenile Court; Superior Court.

CRIMINAL LAW.**1. FAILURE OF APPELLANT TO FILE BRIEF—REVIEW UPON APPEAL.—**

Where the appellant from a judgment of conviction of the crime of passing a fictitious check, and from the order denying his motion for a new trial, has failed to file any brief within the time limited therefor, or within an extension of time agreed to upon suggestion of the attorney general, and the case is submitted for the decision of this court, the appellate court does not feel called upon to search the record for error which possibly might justify a reversal of either the judgment or the order, and they will be affirmed. (*People v. Heck*, 677.)

2. CHANGE OF VENUE IN JUSTICE'S COURT—CONSTRUCTION OF CODE.—

Section 1431 of the Penal Code, relating to a change of venue in the justice's court in a criminal case, is not to be given the same effect as section 833 of the Code of Civil Procedure applicable to the civil actions therein. (*Miles v. Justice's Court*, 454.)

3. AFFIDAVIT FOR BIAS AND PREJUDICE—JURISDICTION NOT OUSTED—

POWER TO DETERMINE SUFFICIENCY OF REASONS—REMEDY BY APPEAL.—An affidavit for bias and prejudice does not *per se* oust the jurisdiction of the justice's court in a criminal case, but the court has power to determine the sufficiency of the reasons set forth, and for any error or abuse of discretion in passing thereon, the defendant has a speedy and adequate remedy by appeal. (*Id.*)

4. OFFICE OF WRIT OF REVIEW.—The writ of review can only be granted where the inferior court has exceeded its jurisdiction and there is no appeal. The writ cannot be allowed to control discretion, nor to review mere errors in the exercise of jurisdiction. (*Id.*)**5. JURISDICTION NOT EXCEEDED.**—The justice of the peace did not exceed its jurisdiction, either in refusing to grant the motion for the change of venue or in proceeding to trial, after denying the same, or in determining the sufficiency of the evidence to support a conviction, or in charging the jury as to the law of the case, and any mere errors committed by the court in the exercise of its jurisdiction can be remedied only upon appeal. (*Id.*)**6. APPEAL FROM JUDGMENT AND ORDER—FAILURE TO REVERSE ORDER**

—REMEDY OF DEFENDANT—MOTION FOR DISCHARGE—POWER OVER ORDER.—Upon a former appeal to this court, in a criminal case, from a judgment of conviction and from an order denying defendant's motion for a new trial, where this court reversed the judgment without expressly ordering a new trial, and failed to dispose of the order, but did not direct the discharge of the defendant, or the dismissal of the case, the sole remedy of the defendant was to apply to this court for such discharge, whereupon this court could dispose of the order denying his motion for a new trial, which, in effect, would have been the ordering of a new trial. (*People v. Ballard*, 511.)

CRIMINAL LAW (Continued).

- 7. EFFECT OF REVERSAL OF JUDGMENT—JURISDICTION OF TRIAL COURT—NEW TRIAL—DISMISSAL NOT REQUIRED.**—The reversal by this court of the judgment of conviction, without ordering a dismissal of the case, or the discharge of the defendant, had the effect to leave the trial court with jurisdiction to proceed with the trial of the case, and it was not required to dismiss the action on the ground that a new trial was not expressly ordered by this court. (Id.)
- 8. GENERAL OBJECTION TO DEPOSITION OF ABSENT WITNESS—FAILURE TO SWEAR WITNESS NOT INCLUDED—OBJECTION UPON APPEAL.** A general objection to the deposition of an absent witness taken at the preliminary examination that the testimony was "immaterial, irrelevant, incompetent and hearsay" did not include the specific objection that the "witness was not sworn," and that objection cannot be urged upon appeal for the first time on the ground that the record fails to show that the witness was sworn, especially where the record shows that the same counsel which represented him in the trial court represented him at the preliminary examination, and cross-examined him thereon, but does not show that he there made such objection. (Id.)
- 9. DUTY OF COUNSEL TO OBJECT TO KNOWN GROUND.**—If in fact the transcript offered in evidence did not show that the absent witness gave his testimony under oath, it was the duty of defendant's counsel to specifically make the objection upon that ground, in order that the court may be informed thereof, and that the record upon appeal may clearly show whether or not the absent witness was sworn. (Id.)
- 10. ORDER SETTING ASIDE INFORMATION—NONAPPEARANCE AT PRELIMINARY EXAMINATION—CONFLICTING AFFIDAVITS—REVIEW UPON APPEAL.**—Upon appeal from an order setting aside an information against the corporation respondent, where it appears that the trial court, upon conflicting affidavits, determined that there was no appearance of the corporation respondent at the preliminary examination, the order appealed from cannot be disturbed. (*People v. Western Meat Co.*, 539.)
- 11. RULE AS TO REVIEW OF QUESTIONS OF FACT—CONFLICT.**—In considering an appeal from an order made upon affidavits involving the decision of a question of fact, the appellate court is bound by the same rule that controls it where oral testimony is presented for review; and if there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered as established. (Id.)
- 12. PRELIMINARY EXAMINATION AGAINST CORPORATION—CODE RULES NOT COMPLIED WITH—QUESTION OF VOLUNTARY APPEARANCE.**—Under sections 1390–1396 of the Penal Code it is required that upon

CRIMINAL LAW (Continued).

a presentment against a corporation, the magistrate must issue a summons signed by him with his name of office, requiring the corporation to appear before him at a specified time and place, to answer the charge, and the charge is required to be investigated in the same manner as in the case of a natural person. Where these rules prescribed in the Penal Code were not complied with, the only question is whether the corporation voluntarily appeared before the magistrate by its authorized attorney. (Id.)

13. APPEARANCE BY ATTORNEY—QUESTION OF AUTHORITY—DISPROOF BY AFFIDAVITS.—There can be no doubt as to the conclusion of the court from the affidavits offered on the part of the corporation defendant that it had authorized no one to appear in its behalf, and that as matter of law no one had authority to represent it at the preliminary examination. Where an attorney without authority announced his representation of the corporation, the corporation cannot be denied the right to show by affidavits that it was not actually represented by counsel. (Id.)

14. PRESUMPTION OF AUTHORITY OF ATTORNEY APPEARING—BURDEN OF PROOF.—It is presumed in law that an attorney appearing and acting for a party has authority to do so, and to do all other acts necessary or incidental to the proper conduct of the case, and the burden of proof rests upon the party denying such authority to sustain his denial by a clear preponderance of the evidence. (Id.)

15. AFFIDAVITS SUPPORTING BURDEN OF PROOF.—Upon the whole of the affidavits and showing made in behalf of the corporation respondent, it is held that the trial court was justified in its conclusion that the corporation satisfied the requirement of the rule imposing upon it the burden of proof that it was not represented by counsel at the preliminary examination, and that the magistrate made a mistake in assuming that the corporation was represented by counsel, who in fact only appeared for an individual defendant examined by the magistrate. (Id.)

16. AFFIDAVIT OF ATTORNEY INADVERTENTLY OMITTED FROM TRANSCRIPT—USE ON HEARING—IRREGULAR AMENDMENT—ORDER OF APPELLATE COURT.—Where a counter affidavit made by the attorney, alleged to have represented the respondent, was in fact used on the hearing, showing that he did not claim to represent the corporation, an amendment of the transcript by the judge without a previous order of this court was irregular, but as no prejudice can result from the irregularity, the affidavit will be ordered made part of the record. (Id.)

17. MISDEMEANOR—LICENSE TAX UNDER COUNTY ORDINANCE NOT PUNISHING NONPAYMENT—PUNISHMENT UNDER PENAL CODE—HABEAS CORPUS.—The fact that a county ordinance imposing a

CRIMINAL LAW (Continued).

license tax to be paid to the tax collector on the business of raising, grazing, herding and pasturing cattle within the county does not denounce the nonpayment of the tax as a crime, cannot entitle one charged with such nonpayment as a misdemeanor under section 435 of the Penal Code to be released on *habeas corpus*. (Matter of Miller, 564.)

18. **CONSTRUCTION OF PENAL CODE—"LAW OF STATE"—ORDINANCES INCLUDED.**—Under section 435 of the Penal Code, providing that "Every person who commences or carries on any business, trade, profession or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law is guilty of a misdemeanor," the words "any law of this state" include ordinances of counties and municipalities. (Id.)
19. **LICENSE TAX ON BUSINESS OF RAISING, GRAZING, HERDING AND PASTURING CATTLE NOT FOR REVENUE — POLICE POWER — DISCRETION.**—A tax on the business of raising, grazing, herding and pasturage of cattle within the county, imposed by a county ordinance, is not a tax for the purpose of raising revenue; but it is a proper exercise of the police power of the county which is extensive, and in the exercise of which a very wide discretion as to what is needful and proper is necessarily committed to the legislative body in which the power to make such laws is vested. (Id.)
20. **MANNER AND EXTENT OF REGULATION—POWER OF COURTS.**—The manner and extent of such regulation are primarily legislative questions, and the courts will not interfere unless it clearly appears that the legislative body has under the guise of regulation imposed an arbitrary or unreasonable burden upon the use of property or the pursuit of an occupation. It is a judicial question whether a particular regulation of the right to pursue a lawful business is a valid exercise of the police power, though the power of the court to declare any regulation invalid will be exercised with the utmost caution. (Id.)
21. **ORDINANCE MUST BE SHOWN TO BE UNREASONABLE.**—An ordinance must be clearly shown by the attacking party to be clearly unreasonable to authorize the interference of the court. (Id.)
22. **PRESUMPTION OF REASONABLENESS.**—The presumption is in favor of the reasonableness of the license tax imposed by a county ordinance. The county in imposing it is not limited to the exact amount of the expense as it may subsequently develop. What expense the county will be put to in the enforcement cannot be determined by the expense of the ordinance itself. (Id.)
23. **EVIDENCE SHOWING REASONABLENESS.**—Where the evidence adduced shows that the amount to be realized from the tax on all owners of cattle is comparatively small, and appears reasonable in view

CRIMINAL LAW (Continued).

of the probable expense to the county that may be caused by the business, even though the amount of such expense is not definitely stated, it cannot be said the presumption is overcome that such expense may approximate the amount of the tax, or that the board was not entirely justified in concluding the tax was proper to meet a reasonable anticipated expense. (Id.)

24. **HABEAS CORPUS—VOLUNTARY AND INVITED SURRENDER TO SHERIFF—ABSENCE OF CONTROL BY SHERIFF—DISMISSAL OF WRIT.**—Where the return of the sheriff to the petition for the writ of *habeas corpus* shows that the petitioner came to him and voluntarily surrendered himself to the sheriff, who did not take control over him, it sufficiently appears that if at the very moment when the writ was applied for he was in the custody of the officer, it was only momentary, and invited to obtain a decision on the validity of the ordinance. This practice is not within the spirit of the *habeas corpus* act, and cannot be countenanced by the court; and the writ will be dismissed on that ground. (Id.)
25. **DEPOSITION OF ABSENT WITNESS FOR PEOPLE—DILIGENCE BY SHERIFF—SUBPOENA FOR PEOPLE—RELIANCE BY DEFENDANT—ABSENCE OF PREJUDICE.**—Where the deposition of a witness for the people taken at the preliminary examination was relied upon by defendant, who sought to prove by the sheriff that the witness could not after due diligence be found in the state, which the court upon objection refused to permit, it is held that even if the court committed technical error in such refusal, it was without prejudice, in view of the admitted facts that defendant issued no subpoena for the witness, that one was issued for the people to the sheriff, that defendant informed the district attorney and sheriff, that he desired the attendance of the witness, and was assured by the sheriff that every effort would be made to secure his attendance, if possible, under the subpoena in his hands. (People v. Johnson, 776.)
26. **"DILIGENCE" A RELATIVE TERM—"DUE DILIGENCE."**—"Diligence" is a relative term, incapable of precise or exact definition; and whether "due diligence," as contemplated by the statute, has been exercised in a given case, must depend upon the facts and circumstances of such case. What would constitute "due diligence" in one case might fall short of it under another and different state of facts. (Id.)
27. **NEGLIGENCE—RELIANCE UPON ADVERSARY FOR PRODUCTION OF WITNESS—GENERAL RULE.**—As a general proposition, where a party to an action, whether civil or criminal, depends entirely upon his adversary for the production of a witness whose testimony he relies upon, and can make no further showing, negligence rather than diligence is thus disclosed. (Id.)

CRIMINAL LAW (Continued).

28. **WANT OF "DUE DILIGENCE" BY DEFENDANT.**—The conduct of the defendant, in taking out no subpoena for the absent witness for the people, whose deposition and cross-examination before the magistrate he wished to use in his own behalf, under subdivision 8 of section 686 of the Penal Code, and in stating merely to the sheriff that he desired to use the absent witness at the trial, and requesting him to use every effort to secure his attendance by means of the subpoena issued to him by the district attorney, did not amount to the "due diligence" required on his part before such deposition could be read by him to the jury. (Id.)
29. **LEGAL RIGHT OF DISTRICT ATTORNEY TO WITHDRAW SUBPOENA.**—The district attorney had the legal right, if he had chosen to exercise it, to withdraw the subpoena issued to him for the absent witness, and to advise the sheriff that, so far as he was concerned, he need make no further effort to procure the attendance of the witness at the trial; and if he should do so, it must be assumed that he had a just and sufficient reason for his course. (Id.)
30. **HABEAS CORPUS—CRIMINAL JURISDICTION—ERRORS—REVIEW UPON APPEAL.**—Where a petitioner for a writ of *habeas corpus* has been held to answer in the superior court upon a criminal charge of which it has jurisdiction, and the affidavit of complaint and commitment and information are sufficient, all subsequent irregularities or errors in the exercise of jurisdiction can only be reviewed upon appeal, and *habeas corpus* will not lie on account thereof. (Matter of Danford, 741.)
31. **STRIKING OUT SECOND OFFENSE NOT EMBODIED IN COMPLAINT—JURISDICTION—SURPLUSAGE—ELECTION.**—The striking out from the information of an offense not embodied in the complaint did not go to the jurisdiction for the purpose of the petition for the writ of *habeas corpus*. The court had authority to strike it out as surplusage, and the order granting the motion had the effect of an election to proceed only upon the offense properly charged. (Id.)
32. **RULE AS TO SUFFICIENCY OF INDICTMENT OR INFORMATION.**—Where an indictment or information purports or attempts to state an offense of a kind of which the superior court has jurisdiction, the question whether the facts charged are sufficient to constitute an offense cannot be examined into upon writ of *habeas corpus*. Such inquiry is only permissible where there is for review a proceeding in an inferior court. (Id.)
33. **REVIEW OF PROCEEDING IN COURT OF GENERAL JURISDICTION.**—Where this court is called upon to review upon writ of *habeas corpus* a proceeding in a court of general jurisdiction, a rule which would apply to an indictment therein would apply with equal force to an information filed in such court. (Id.)

CRIMINAL LAW (Continued).

34. **ARSON—ABSENCE OF ARGUMENT—ERROR NOT APPEARING—AFFIRMANCE.**—Upon appeal by a defendant convicted of arson in the second degree, where the case was submitted without oral or written argument for appellant, and upon examination of the record, it appears that the evidence against the defendant, though circumstantial, cannot be held insufficient to support the verdict, that the instructions were fair and complete, and that in the trial of the case all rights of the defendant were scrupulously regarded and protected, and no error appearing in the record, the judgment and order appealed from must be affirmed. (*People v. Hoffman*, 298.)
35. **ARSON—CIRCUMSTANTIAL EVIDENCE—SUPPORT OF VERDICT.**—Upon appeal from a judgment of conviction for the crime of arson, and from an order denying a new trial, where insufficiency of wholly circumstantial evidence to support the verdict is claimed, it is held, upon a consideration of the circumstances, and from the reading of the entire record, that, though the case is a close one, yet the evidence is deemed sufficient to sustain the verdict. (*People v. Scott*, 301.)
36. **INSTRUCTIONS — REQUEST MARKED “GIVEN” — IMMATERIAL CHANGE IN LANGUAGE—JURY PROPERLY INSTRUCTED.**—The fact that an instruction marked “Given” was slightly changed in language is immaterial, where the instruction was given in substance, and the subject thereof was fully covered. As to other instructions criticised, it is sufficient that it clearly appears that the jury was fully and fairly instructed by the trial judge upon every phase of the law appertaining to the case. (*Id.*)
37. **ABSENCE OF ERROR IN EVIDENCE.**—It is held that no error was committed in the admission or rejection of evidence. (*Id.*)
38. **CONTINUANCES OF SENTENCE AFTER VERDICT — ORDERS PRIOR AND SUBSEQUENT TO AMENDMENT OF PENAL CODE.**—Where the verdict was rendered, and continuances of sentence and judgment were extended for thirty days prior to the taking effect of the amendment of 1909 to section 1191 of the Penal Code, such continuances were regular, and a further continuance of eleven days thereafter, being less than ten after the five days allowed by the amended statute, for the purpose of hearing and determining a motion for a new trial, is also regular. (*Id.*)
39. **REVIEW OF CONTINUANCE AFTER CODE AMENDMENT UPON APPEAL — PURPOSE NOT SHOWN IN RECORD—PRESUMPTION UPON APPEAL.**—Where the record upon appeal is silent as to whether the continuance for eleven days after the amendment of section 1191 took effect on June 13, 1909, was for the purpose of hearing and determining a motion for new trial, it must be presumed upon appeal in support of the order that it was granted for that purpose. (*Id.*)
40. **ARSON—SUPPORT OF VERDICT.**—It is held that the evidence is sufficient to sustain the verdict of conviction of the defendant of the

CRIMINAL LAW (Continued).

crime of arson in the first degree as charged in the information. (People v. Saunders, 743.)

41. **GENERAL RULE AS TO REVIEW OF VERDICT—QUESTIONS OF LAW AND OF FACT.**—In criminal cases, generally, this court can pass only upon questions of law, and it is only when there is an entire lack of evidence to support the verdict that a question of law is presented. If the evidence bearing against the defendant, considered by itself, without regard to conflicting evidence, tends to support the verdict, the question ceases to be one of law, of which this court alone has jurisdiction, and becomes one of fact upon which the decision of the jury and of the trial court is final and conclusive. (Id.)
42. **CORPUS DELICTI—BURNING INSUFFICIENT—ADMISSION OF DEFENDANT—PROOF OF DISTINCT FIRES—ACCIDENT REBUTTED.**—The mere proof of the burning of a building does not establish the *corpus delicti* of arson; and the admissions and statements of the defendant are not sufficient, of themselves, to justify a conviction without proof of the *corpus delicti*. But where the physical condition of the premises showed that three separate and distinct fires had been started, and it further appeared to be improbable that the fire was the result of accident, the *corpus delicti* of arson was sufficiently established. (Id.)
43. **ORDER OF PROOF—DEFENDANT'S ADMISSIONS—DISCRETION OF COURT.** The order of proof is in the discretion of the court. Though most of the admissions of defendant were proved subsequent to the proof of the *corpus delicti*; if any one or more of them were proved before that proof was made, that fact will not justify a reversal of the judgment. (Id.)
44. **EXPERT EVIDENCE STRICKEN OUT—SUBSEQUENT STATEMENT OF FACTS PROPERLY ADMITTED.**—Where the expert evidence of the fire marshal as to three distinct fires, admitted over an objection, was stricken out, the court did not err in permitting him to state the facts observed by him which showed such distinct fires. (Id.)
45. **EVIDENCE—REMARK OF DEFENDANT TO POLICE OFFICER ARRESTING HIM—UNTENABLE OBJECTION—DEGRADING CHARACTER OF REMARK.**—Where defendant was charged with burning part of a hospital from which he had been discharged, evidence of a remark made by him to the police officer arresting him speaking disparagingly of attaches of the hospital, and stating that he would get even with the hospital authorities, was not objectionable on the ground that it would tend to degrade him. (Id.)
46. **PRIVILEGED QUESTION CONFINED TO EXAMINATION OF WITNESS—REMARK TO OFFICER NOT PRIVILEGED.**—It is only when the answer to a question asked of a witness would tend to degrade him that the answer is privileged. But where, as here, no question was asked of defendant as a witness, but the proof was confined to a voluntary

CRIMINAL LAW (Continued).

statement made by him to the police officer, such statement was not privileged on that ground. (Id.)

47. **REMARK OF PROSECUTING ATTORNEY — "CHARACTER OF DEFENDANT BEING DEGRADED."**—The remark of the prosecuting attorney where the evidence of the police officer was objected to as "tending to degrade the defendant," that "the character of the defendant is being degraded as we go along, that is our object," while it would better have been left unsaid, is of too trivial a nature to require a reversal. What he was probably understood to mean was that the defendant was being degraded by the evidence tending to prove him guilty of the crime charged. (Id.)
48. **EXAMINATION OF WITNESSES BY COURT—PERTINENT QUESTIONS—ABSENCE OF LEANING AGAINST DEFENDANT.**—The fact that the court took a prominent part in the examination of the witnesses does not indicate any misconduct on his part, where his questions were not only pertinent, but showed no leaning against the defendant. (Id.)
49. **NEWLY DISCOVERED EVIDENCE OF INSANITY WHEN CRIME WAS COMMITTED—DISCRETION OF COURT.**—Where the defendant moved for a new trial on newly discovered evidence that he was insane at the time of the commission of the act charged, it cannot be said that the court abused its discretion in the matter of refusing continuances to secure such proof, or in denying the motion for a new trial. (Id.)
50. **ASSAULT WITH INTENT TO COMMIT ROBBERY—SUFFICIENCY OF INFORMATION.**—An information against defendants jointly charged with the crime of "assault with intent to commit robbery," in that said defendants, at a time specified, at the county of the venue, "in and upon one John Connolly, feloniously, and with force and violence, did make an assault, with intent the money, goods and chattels of the said John Connolly, from the person and immediate presence and against the will of him, the said John Connolly, then and there, feloniously, and by force, violence and intimidation, to steal, take and carry away, contrary to the form of the statute," etc., is sufficient, and a demurrer thereto was properly overruled. (People v. Holden, 354.)
51. **RULE AS TO "MEANS" INAPPLICABLE—UNNECESSARY AVERMENTS.**—The rule that where "an assault by means likely to produce great bodily injury" is charged, there must be a particular designation of the "means used," does not apply to the offense here charged. It is not necessary that the information for "an assault with intent to commit robbery" should allege how or by what "means" the assault was committed, or should set forth the "means" used to constitute force or to excite fear. (Id.)
52. **AVERMENT OF "POSSESSION OF PROPERTY" NOT REQUIRED—GIST OF OFFENSE—SUFFICIENT AVERMENT OF INTENT TO ROB.**—The infor-

CRIMINAL LAW (Continued).

- mation was not required to aver that the prosecuting witness was, at the time of the offense, in the possession of personal property. Highwaymen do not first ascertain whether their victim has money or property before attacking; and it would be unreasonable to hold that an intent to rob could not be charged, without averring or proving that the victim had something of which he could be robbed. The gist of the offense is the assault with intent to rob; and the information properly sets forth the assault with the intent by force, violence and intimidation to rob the prosecuting witness of his "money, goods and chattels." (Id.)
53. **INSTRUCTIONS—REQUESTS ELSEWHERE GIVEN.**—The defendant was not prejudiced by the refusal of requested instructions which were elsewhere substantially given in the charge of the court. (Id.)
54. **INSTRUCTION AS TO GOVERNMENT BY EVIDENCE—REQUEST AGAINST "PREJUDICE" AND "SUSPICIONS"—ASSUMED INTELLIGENCE OF JURY.** It must be assumed that the jury were intelligent men; and if they are instructed by the court that they must be governed by the evidence alone, it cannot be said that they were governed otherwise, because not instructed at defendant's request not to be governed by any "prejudice" or by their "own unaided suspicions." (Id.)
55. **REFUSAL OF REQUEST AS TO CIRCUMSTANTIAL EVIDENCE NOT PREJUDICIAL.**—It cannot be said that the refusal to give a detailed instruction as to circumstantial evidence was prejudicial, where substantially all of the evidence of the crime was direct; and the law makes all competent evidence admissible, whether direct or circumstantial, and leaves it to the jury to determine its relative weight in each case. When, therefore, full instructions were given that the jury must be guided entirely by the evidence, and must be convinced beyond a reasonable doubt, they cover both classes of evidence, and it must be assumed that the jury will so apply them. (Id.)
56. **REQUESTED INSTRUCTION—CAUTION AS TO VERBAL ADMISSIONS.**—A requested instruction declaring that "with respect to all verbal admissions it may be observed that they should be received with great caution," was properly refused as being argumentative and an instruction concerning matters of fact. (Id.)
57. **ARGUMENT UPON APPEAL—ALLEGED ERRORS DEEMED WAIVED.**—Alleged errors in the admission of evidence not pointed out in the appellant's brief must, in the absence of any oral argument presenting them, be deemed waived. (Id.)
58. **BURNING "STACKS" OF HAY—CONSTRUCTION OF PENAL CODE—SCATTERED "COCKS" OF HAY EXCLUDED.**—Under section 600 of the Penal Code making it a felony willfully and maliciously to burn "any stack of hay" of the value of \$25 or over, the willful and malicious

CRIMINAL LAW (Continued).

burning of scattered "cocks of hay," not gathered into any "stacks," though of the value of \$25 or over, however it may be punished, is excluded from being considered as a felony under the terms of that section. (People v. Doyle, 611.)

59. DISTINCTION BETWEEN A "STACK" AND "COCK" OR "SHOCK" OF HAY.

There is a marked and well understood distinction between a "stack" and a "cock" or "shock" of hay. Customarily, shortly after hay is mowed or cut, it is raked into small piles or cocks, and is thus allowed to remain until it becomes thoroughly dry or "seasoned," after which it is generally picked up and put into large piles called "stacks." (Id.)

60. CONSTRUCTION OF PENAL STATUTE—DESCRIPTION OF PROPERTY—

GENERAL RULE.—As a general rule, where any particular article of property is mentioned in a penal statute as the subject of an offense, only such property as is usually designated by such terms can be regarded as having been intended by the legislature to be embraced in its provisions. (Id.)

61. CHARGE OF BURNING "STACKS" OF HAY—VARIANCE—PROOF OF

BURNING "COCKS" OF HAY—MISDEMEANOR.—Under an information charging the defendant with a felony by willfully and maliciously burning "stacks" of hay of the value of \$25, in violation of section 600 of the Penal Code, and the proof shows only the burning of "cocks" or "shocks" of hay, the variance in the proof is fatal, and shows only a misdemeanor committed under section 594 of that code. (Id.)

62. INAPPLICABLE AND MISLEADING INSTRUCTION—ABSTRACT CORRECT-

NESS—SIZE OF "STACKS."—Where the evidence shows no "stack" of hay but only the burning of "cocks" or "shocks," of the value of no more than one dollar each, an abstractly correct instruction, inapplicable to the facts that if the jury "find from the evidence beyond a reasonable doubt that the defendant did attempt to burn certain stacks of hay of the value of \$25, then you will find the defendant guilty regardless of the size of the individual stacks of hay, no matter whether they were large or small," was plainly calculated to mislead the jury. (Id.)

63. INSTRUCTION ERRONEOUSLY REFUSED.—The refusal of the court to

instruct the jury, as requested by the defendant, as to the proper distinction between "stacks" and "cocks" of hay was prejudicially erroneous. (Id.)

64. DUTY OF COURT UNDER PROOFS.—Under the proofs, the court should

have advised the jury to acquit the defendant. (Id.)

65. DYNAMITING DWELLING—ACT OF LAD IN DEFENDANT'S CUSTODY—

FEAR OF LIFE—EVIDENCE—OTHER FELONIES—THEORY AGAINST ACCOMPLICE.—Where a woman defendant was charged with dynamiting a dwelling, and it appears that the act was done at her instigation

CRIMINAL LAW (Continued).

by a lad of sixteen, who was in her custody, and was prosecuting witness against her, and other evidence was admitted, over her objection, that she had treated the lad cruelly, and had required him to commit other felonies named, for her benefit, on the theory that the lad, as a witness, was not an accomplice whose evidence required corroboration, because compelled to do the act charged, by reason of defendant's menace, and threats of taking his life, it is held that such evidence was not admissible on that theory, since the lad's testimony clearly shows that there was no imminent danger of losing his life, but only a threat of a future, remote and conditional danger thereto, which might have been avoided if the act were refused. (People v. Martin, 96.)

66. **CONSTRUCTION OF PENAL CODE—EXCEPTION TO CAPABILITY TO COMMIT CRIME—THREATS—REASONABLE BELIEF OF IMMINENT DANGER TO LIFE.**—Section 26 of the Penal Code, naming as an exception to persons capable of committing crime, "persons (unless the crime be punishable with death) who committed the act or made the omission complained of under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered, if they refused," is to be construed as importing that a reasonable belief must be so caused that there was an imminent or impending danger to life. (Id.)
67. **ANOMALOUS CONSTRUCTION — OTHER PROVISIONS — RIGHT OF SELF-DEFENSE—IMMINENT DANGER.**—Since it appears from other provisions of the Penal Code, as well as from the common-law rule, that the right of self-defense or forcible resistance to an aggressor exists only in the presence of imminent danger, it would be an anomalous condition or construction of the law under section 26 of the Penal Code that would justify or excuse the commission of a felony against the person or property of an innocent person, because the person doing the deed had reason to fear, and did fear, not an imminent and immediate danger, but a future and remote danger, which in the very nature of things could be readily averted by innocent methods. (Id.)
68. **COMPULSION OF MINOR—CONSTRUCTION OF STATUTE UNAFFECTED.**—The fact that in this case the person committing the deed, and claiming that it was done under such compulsion as excused him from criminality, was a minor of sixteen years of age, cannot affect the construction of the statute which is general in its terms and applicable to persons of any age. It must be given a reasonable meaning to effect the design of the legislature and promote justice. It requires the same reasonable belief of imminent danger, induced in the same manner, in the case of a minor as in the case of any other person to excuse responsibility for crime. (Id.)
69. **INADMISSIBLE EVIDENCE OF MINOR AS WITNESS—MOTION TO STRIKE OUT.**—Inasmuch as it is clear that the minor witness had no

CRIMINAL LAW (Continued).

- fear of imminent danger to his life, but only a fear that defendant at some future time and at some remote place would kill him, all of the evidence admitted as tending to show the existence and reasonableness of such fear was improper, and should have been stricken out on motion of the defendant. (Id.)
70. **ERRORS NOT CURED—PROOF BY DEFENDANT.**—Such errors were not cured by the testimony of a witness for the defendant that the minor witness had confessed to him the commission of crimes, and implicating defendant therein, where such testimony covers nowhere near all of the matter erroneously admitted, and which should have been stricken out. (Id.)
71. **IRRELEVANT EVIDENCE—DEFENDANT'S POSSESSION OF POISONS WHEN ARRESTED.**—It was error to admit irrelevant evidence to show that defendant, when arrested, ten months after the crime charged, had possession of poisons having no relation to that crime. (Id.)
72. **OBSCENE LETTERS AND WRITINGS OF DEFENDANT—PREJUDICIAL ERROR.**—It was prejudicial error to admit in evidence obscene letters and writings of the defendant, in no way connected with the crime charged and tending to show her to be a depraved and vicious woman. (Id.)
73. **IRRELEVANT EVIDENCE AS TO OTHER OFFENSES.**—All of the evidence tending to show defendant's connection with other acts and offenses having no relation to the offense charged was highly prejudicial. (Id.)
74. **PREJUDICIAL ERROR IN EVIDENCE—NEW TRIAL.**—When, as in this case, irrelevant testimony has been admitted, and is of such a character as to be necessarily prejudicial to the defendant appealing, a new trial must be granted. (Id.)
75. **TIME FOR FILING INFORMATION—NEW INFORMATION BY LEAVE OF COURT—CURE OF DEFECTS—CONSTRUCTION OF PENAL CODE.**—Where a first information was filed within the thirty days after commitment by the examining magistrate as required in section 1382 of the Penal Code, that section has no application to a new information for the same offense filed by leave of the court, to cure defects in the original. (People v. Holmes, 212.)
76. **MOTION TO DISMISS NEW INFORMATION—PRESUMPTION AS TO PRELIMINARY EXAMINATION—NEW EXAMINATION NOT REQUIRED.**—For the purpose of a motion to dismiss the new information under section 1382 of the Penal Code, it must be presumed to be based upon the original preliminary examination. No new preliminary examination is necessary. (Id.)
77. **FAILURE TO BRING CAUSE TO TRIAL WITHIN SIXTY DAYS—EXCUSE FOR DELAY—"GOOD CAUSE TO CONTRARY."**—Regardless of whether a motion to dismiss the cause for failure to bring it on for trial

CRIMINAL LAW (Continued).

within sixty days after the filing of the information be based upon the filing of the new information or of the original information, it was properly denied, where the affidavit filed and showing made by the district attorney, in excuse for the delay, showed "good cause to the contrary," within section 1380 of the Penal Code. (Id.)

78. OBJECTION TO TIME OF TRIAL NOT SHOWN BY RECORD—PRESUMED CONSENT.—It is to be presumed that the time set for the trial was consented to where the record upon appeal shows that the defendant and his counsel were present in court when it ordered the cause set for trial on a date more than sixty days after the filing of the information, but fails to show that defendant or his counsel objected to such order. (Id.)

79. EMBEZZLEMENT OF NOTES AND MORTGAGE—REQUESTED INSTRUCTIONS—BELIEF IN RIGHT OF TRANSFER—CLAIM "IN GOOD FAITH" LACKING.—Upon the trial of a charge of embezzlement of notes and a mortgage executed to defendant by a third party and intrusted to his possession for a specific purpose, and appropriated to his own use in violation of the trust, requested instructions that "if the evidence shows that defendant sold and transferred all his right, title and interest in and to the notes and mortgage, openly and avowedly, the defendant believing that he had the right so to do, you should acquit the defendant," and that "if the evidence shows the defendant believed the notes and mortgage was a part of a partnership fund belonging to defendant and the maker, you should acquit the defendant," were both properly refused, as failing to include in either the essential element of "a claim of title preferred in good faith" required by section 511 of the Penal Code. (Id.)

80. ABSENCE OF EVIDENCE SHOWING "GOOD FAITH" OR "BELIEF OF OWNERSHIP"—WANT OF CONSIDERATION—TRUST FOR PURCHASE NOT MADE.—Where it appears that the notes and mortgage were deposited with defendant in trust to secure the purchase of one or more rooming-houses for the maker, and no right of defendant therein could ripen until such purchase was made and secured, and no such purchase was ever made or attempted, and the notes and mortgage were otherwise wholly without consideration, and when they were converted to defendant's use, he immediately left the state, there is no evidence upon which either "good faith," or "belief of ownership" could be predicated, even if the instructions requested were within the letter of section 511 of the Penal Code. (Id.)

81. GROUNDS FOR SETTING ASIDE INDICTMENT—IRREGULARITIES IN IMPANELMENT OF JURY.—Under section 995 of the Penal Code, enumerating the grounds for setting aside an indictment, no mere irregularities in the formation and impanelment of the grand jury

CRIMINAL LAW (Continued).

- other than such as are grounds of challenge, either to the panel or to an individual juror, are grounds for setting aside the indictment. (People v. Hatch, 521.)
82. **GROUND OF CHALLENGE LIMITED TO DEFENDANT NOT HELD TO ANSWER.**—The grounds of challenge to the panel of the grand jury or to an individual grand juror can only be relied upon by a defendant who has not been held to answer before the finding of the indictment. (Id.)
83. **BILL OF EXCEPTIONS NOT SHOWING RIGHT OF CHALLENGE.**—Where the bill of exceptions upon this appeal does not show that this defendant was not held to answer before the finding of the indictment, in the absence of such showing it cannot be presumed that he was not. The appellant must affirmatively show error, and as his right to rely upon grounds of challenge to the panel or to an individual juror depended upon his not having been held to answer before the finding of the indictment, the record on appeal must show it. (Id.)
84. **RECITAL IN MOTION TO SET ASIDE INDICTMENT NOT EVIDENCE.**—A recital in the motion to set aside the indictment that the defendant had not been held to answer before the finding of the indictment is not evidence of that fact. (Id.)
85. **AFFIDAVIT UPON APPEAL NO PLACE OF RECORD.**—An affidavit of the defendant filed in this court, which on its face does not appear to have been read or used on the hearing of the motion to set aside the indictment, but upon a motion for continuance of the hearing thereon, is no part of the record upon appeal. (Id.)
86. **EXCLUSION OF GRAND JURORS — OPINIONS AGAINST DEFENDANT — ADVICE OF DISTRICT ATTORNEY — REVIEW UPON APPEAL.**—It is questionable whether the departure of three grand jurors from the jury-room while the grand jury was acting upon the indictment against the defendant, upon the advice of the district attorney, on the ground that they had expressed unfavorable opinions against the defendant, falls within the ground of motion to set aside the indictment on the ground that it was “not found, indorsed or presented,” as prescribed in subdivision 1 of section 995 of the Penal Code. But in passing upon the action of the trial court the evidence must be viewed in the light most favorable to the action of the trial court. (Id.)
87. **PURPOSE AND EFFECT OF ACTION OF DISTRICT ATTORNEY.**—The action of the district attorney was for the purpose of preventing disqualified jurors from acting upon the indictment. By reducing the number of the grand jurors, it reduced the chance for obtaining twelve affirmative votes for an indictment; and the defendant could not have been injured thereby. (Id.)
88. **MISCONDUCT OF DISTRICT ATTORNEY — ADVICE TO GRAND JURY AS TO SUFFICIENCY OF EVIDENCE — VALIDITY OF INDICTMENT NOT AF-**

CRIMINAL LAW (Continued).

FECTED.—The alleged misconduct of the district attorney in advising the grand jury that the evidence was sufficient to warrant an indictment, though disapproved of, cannot affect the validity of the grand jury, nor constitute a ground of a motion to set aside the indictment found thereby, not being included in any of the grounds specified in section 995 of the Penal Code. (Id.)

89. COMPETENCY OF EVIDENCE BEFORE GRAND JURY NOT REVIEWABLE.—

While the law contemplates that only competent evidence be received by the grand jury, yet if it should receive incompetent evidence and should find an indictment thereon, there is no method of reviewing its action in so doing. (Id.)

90. NATURE OF INDICTMENT—ACCUSATORY PAPER—IRREGULARITIES NOT REVIEWED.—An indictment is but an accusatory paper, and it was not intended that on a motion to dismiss, irregularities before the grand jury should be reviewed except as expressly provided in the statute. (Id.)

91. INDICTMENT—RECORD OF JUDICIAL BODY—FINALITY OF ACTION.—An indictment is a record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for reviewing it. (Id.)

92. PROPER ACTION OF TRIAL COURT—REFUSAL OF PROOF—SUFFICIENCY AND COMPETENCY OF EVIDENCE BEFORE GRAND JURY.—The trial court committed no error in refusing to allow the defendant to introduce evidence as to the sufficiency and competency of the evidence heard by the grand jury. The court cannot inquire into the sufficiency of proof, or the mode of examining witnesses to invalidate an indictment. (Id.)

93. MOTION TO STRIKE INDICTMENT FROM FILES.—A motion to strike an indictment from the files is in substance and effect a motion to set aside the indictment, and was properly denied. (Id.)

94. DEMURRER TO INDICTMENT—PARTICIPIAL FORM OF AVERMENT.—The use of the participial form of averment in alleging facts necessary to the statement of an offense is not to be commended, but it is sufficient in the face of a general demurrer under the liberal system of pleading allowed in this state. (Id.)

95. EMBEZZLEMENT—TWO OFFENSES NOT ALLEGED.—An indictment for embezzlement does not charge two offenses in alleging both that the defendant secreted the money with the fraudulent intent to appropriate it and that he did fraudulently appropriate it. (Id.)

96. CONJUNCTIVE AVERMENTS PERMISSIBLE.—Where, as in section 506 of the Penal Code, defining embezzlement, several acts are prohibited and made punishable, the defendant may be charged conjunctively with doing two or more of the prohibited acts, and the indictment will not be open to attack for duplicity. (Id.)

CRIMINAL LAW (Continued).

- 97. INSTRUCTION FOR DEFENDANT PROPERLY REFUSED—CORPUS DELICTI—REASONABLE DOUBT—ADMISSIONS.**—An instruction requested for the defendant which required that the *corpus delicti* must be proved beyond a reasonable doubt, before extrajudicial statements or admissions of the defendant may be considered at all, was properly refused. The correct rule is that there must be some proof of the body of the crime before extrajudicial statements or admissions of the defendant may be considered, but it is not required that such proof shall go to the extent of establishing the crime beyond all reasonable doubt. (Id.)
- 98. MISLEADING INSTRUCTION—"TRUST RELATIONS"—CIVIL DUTIES.**—Where defendant testified that he borrowed money from the prosecuting witness, who denied such loans, and testified that he was her agent and attorney to negotiate loans and invest the money securely for her benefit, and it appeared that he was in fact insolvent when he claimed to have made the loans for himself without security, and did not disclose to her his financial condition, an instruction which, after stating the right of defendant to borrow money and the nature of the crime charged as a "misappropriation of property received by him in a trust relation," became prejudicially misleading by adding words applicable to mere civil duties: "In all matters connected with trust relations an agent, attorney or trustee is bound to act in the highest good faith toward his principal, client or beneficiary, and cannot obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat or adverse pressure of any kind." (Id.)
- 99. CONTROVERTED MATTER BEFORE JURY—EMBEZZLEMENT OF MONEY OF PROSECUTRIX—NATURAL SUPPOSITION OF JURY.**—The only controverted matter before the jury was as to whether or not defendant embezzled the money of the prosecutrix. They would naturally suppose that the instruction as to "trust relations" was intended to guide them in determining that question, and that it was intended to inform them that if he obtained a loan from her by the slightest concealment, he was guilty of embezzlement in so doing. (Id.)
- 100. CORRECT STATEMENT OF LAW AS TO CIVIL RELATIONS—ERRONEOUS RULE FOR GUIDANCE OF JURY AS TO EMBEZZLEMENT.**—While the latter part of the instruction was a correct statement of the law governing the relations of an agent or attorney and his principal concerning their respective duties and rights in their civil relations, it was misleading and incorrect as a rule for the guidance of a jury in determining whether or not the agent was guilty of embezzlement; and under the condition of the evidence, and in the connection in which the latter part of the instruction was given, it was erroneous and prejudicial to the rights of the defendant. (Id.)

CRIMINAL LAW (Continued).

101. **EVIDENCE OF DISTINCT EMBEZZLEMENTS.**—Where the evidence for the prosecution shows that if defendant is guilty at all, he is guilty of several distinct embezzlements, and that the appropriations of moneys to his own use were not made at one time, but at different times and in different amounts, under such circumstances, each appropriation is a distinct offense. (Id.)
102. **DUTY OF DISTRICT ATTORNEY TO ELECT.**—Where several substantive offenses have been proved, either one of which would support a verdict of guilty under the indictment charging one offense, the district attorney should elect as to which offense he will rely upon for a conviction. (Id.)
103. **PROOF OF RECEIPT OF SEPARATE MONEYS NOT REQUIRING ELECTION.** Proof of the mere receipt by the defendant of separate items of money does not put the district attorney to an election of the first item proved. It is not the receipt of the money, but the fraudulent appropriation of it, which constitutes the offense; and it will be possible for defendant to receive many items before embezzling any money. It may happen that an aggregate sum of money received at different times may be appropriated by one act. (Id.)
104. **PREJUDICIAL COURSE OF DISTRICT ATTORNEY—ERRONEOUS INSTRUCTION.**—When, under the evidence, several distinct appropriations were shown, it was prejudicially erroneous for the district attorney, instead of electing to rely upon one of them, to secure an instruction that if the jury “should find that defendant was the agent, attorney or trustee” of the prosecutrix, “and as such agent, attorney or trustee he received her money as charged in the indictment, and within three years” prior to the indictment “fraudulently appropriated it to an amount above fifty dollars, not in the due and lawful execution of his trust, but to his own use and benefit, you must find the defendant guilty as charged in the indictment.” (Id.)
105. **POWER OF JURORS UNDER INSTRUCTION.**—Under such instruction, in view of the evidence, the several jurors could range over the evidence at will, and pick out any of a dozen or more offenses proved, and found his verdict thereon; and no court could say from the record of which offense proved under the indictment the jury found the defendant guilty. No instruction should be given which will permit the jurors to find upon more than one offense. (Id.)
106. **PROOF NOT LIMITED TO OFFENSE PROPERLY ELECTED.**—Where the district attorney has properly elected to rely upon one offense, the proof is not limited to such offense only. In embezzlement cases, other embezzlements may be proved for the purpose of proving intent, system, knowledge or the like, and it is often proper to

CRIMINAL LAW (Continued).

prove offenses other than the substantive one upon which the indictment is predicated. (Id.)

107. **ATTEMPT TO ESCAPE FROM STATE PRISON — FELONY — INVALID CHARGE OF ESCAPE.**—Conceding that section 105 of the Penal Code, punishing the crime of escape from the state prison by imprisonment therein for a term equal in length to the term the defendant was serving at the time of such escape, to commence from the time he would otherwise have been discharged from said prison, is invalid, as being in conflict with the state and federal constitutions, yet where under such charge the defendant pleads not guilty, and afterward pleads guilty to the distinct charge embodied in section 106 of the Penal Code, making it a felony to attempt to escape from the state prison, the legislature has in effect embodied section 18 of the Penal Code defining the punishment for a felony with section 106 thereof. (In re Cook, 399.)

108. **CRIME OF ATTEMPTING TO ESCAPE EMBODIED IN CHARGE OF ESCAPE.** The crime of an attempt to escape is necessarily embodied in the language of the charge of an escape, even though such charge is not valid, since no one can escape from state's prison without attempting to escape therefrom. (Id.)

109. **ABSENCE OF DEMURRER.**—In the absence of a demurrer to the indictment, whatever defects may characterize the mode of statement of the offense of which the defendant pleaded guilty were waived by the plea, which amounted to an admission that the offense to which he confessed his guilt was within the language of the indictment. (Id.)

110. **COURT CLOTHED WITH POWER TO SENTENCE AND PUNISH.**—After such plea of guilty of an attempt to escape, the court was clothed with full power and jurisdiction to pronounce and cause to be entered the judgment of punishment for the felony charged. (Id.)

111. **WRIT OF HABEAS CORPUS NOT TENABLE.**—A writ of *habeas corpus* to test the validity of such additional judgment for felony must be discharged, and the prisoner remanded to the warden of the state prison. (Id.)

112. **MODE OF DETERMINING SUFFICIENCY OF INDICTMENT.**—The correct way to determine the sufficiency of an indictment is to take its language in its ordinary accepted meaning, and its statements as to the matters and things that defendant did, and then compare them with the statute which it is claimed has been violated, for the purpose of determining the question as to whether or not the defendant is charged in plain language with having done a particular act or thing which is made a crime by the statute. (People v. Emmons, 487.)

113. **OBTAINING MONEY UNDER FALSE PRETENSES—SUFFICIENCY OF INDICTMENT.**—An indictment stating that defendant did on a specified

CRIMINAL LAW (Continued).

day, knowingly, falsely and fraudulently, pretend and represent to a person named, that he, the said defendant, was the sole owner of a mining claim described, and that there was then being erected and constructed on said mine a ten-stamp mill, and that all litigation concerning the mining claim was settled, and which avers the particular falsity of each and all of said pretenses and representations, and that such person, believing each and all of them to be true, was thereby induced to deliver to defendant the sum of \$500, and that defendant fraudulently and feloniously received, took and carried away the same, sufficiently states the crime set forth in section 582 of the Penal Code. (Id.)

114. **UNNECESSARY AVERMENTS—EVIDENTIARY FACTS.**—It was not necessary, and would have been bad pleading, for the indictment to state what the defendant intended to do with the money, or that the money was never returned to the person defrauded, or any other evidentiary fact. (Id.)

115. **MATTER OF DEFENSE.**—If the defendant did not obtain the money in the manner charged in the indictment, or if it was paid to him with full knowledge of all the facts and circumstances, or if it was a loan, or given to him for the purpose of depositing in bank, such fact or facts could be shown by him in defense. (Id.)

116. **PURPOSE OF INDICTMENT ANSWERED.**—The indictment has answered its purpose when it fully and fairly informs the defendant of the acts he is accused of, so that he can prepare for his defense and defend himself as to such acts, and so that it can be determined, as matter of law, whether or not such facts as are alleged in the indictment constitute a crime under the statute; and the indictment is sufficient if the acts stated show a violation of the statute. (Id.)

117. **DEMURRER TO INDICTMENT AND MOTION IN ARREST OF JUDGMENT PROPERLY OVERRULED.**—The indictment being sufficient, a demurrer thereto, and a motion in arrest of judgment for its insufficiency, were properly overruled. (Id.)

118. **SUPPORT OF VERDICT.**—The evidence is held sufficient to support the verdict of guilty of the offense charged. (Id.)

119. **DEFENDANT'S RIGHT TO STAND MUTE—PREJUDICIAL ERROR IN REFUSING INSTRUCTION—IMPERTINENT SUBSTITUTION—REVERSAL.**—The court erred to defendant's prejudice, requiring a reversal in refusing his requested instruction that "the defendant has a legal right to take the stand as a witness, or not to do so, just as he pleases, or as his counsel may advise. The mere fact that he does not testify raises no presumption or prejudice against him, and the jury cannot draw any unfavorable inference against a defendant who does not offer himself as a witness"; and in substituting

CRIMINAL LAW (Continued).

in lieu thereof section 1823 of the Penal Code, involving the impertinent right to cross-examine a defendant who testifies. (Id.)

120. RIGHT OF DEFENDANT TO FAIR TRIAL—CORRECT INSTRUCTION NOT ROBBED OF FORCE.—The defendant was entitled to a fair trial, and to a correct instruction pertinent to the issue, without having it coupled with another statement not pertinent to the issue, which robbed it of all its force as to defendant's rights. (Id.)

121. CONSTITUTIONAL RIGHTS OF DEFENDANT.—The defendant has the constitutional right to stand mute, without unfavorable presumption from his silence, and to demand that the prosecution prove the case against him beyond a reasonable doubt. (Id.)

122. DUE ADMINISTRATION OF JUSTICE—ABSENCE OF PREJUDICIAL INSTRUCTIONS.—It tends to the due and proper administration of justice for the trial court to leave the jury entirely free to pass upon each and every fact and phase of the case, without any prejudicial instructions, or any intimation by the court as to the weight of the evidence. When an instruction is asked for by a defendant which contains a correct statement of the law, and is pertinent to the issue and the evidence, it should be given, without being weakened or emasculated by an additional statement not so pertinent, although in the abstract containing a correct statement of the law. (Id.)

123. CONDITIONAL INSTRUCTION AS TO CROSS-EXAMINATION OF DEFENDANT IMPROPER.—No occasion can arise during a trial of a criminal case for giving the jury an instruction as to the fact that the defendant could be cross-examined, if he should be a witness, when he is not a witness. If he were a witness, the court and not the jury would determine the question of his cross-examination and the extent thereof; and the jury should not be given an instruction as to substantive law which is for the court and not for the jury under any circumstances. (Id.)

124. ERROR IN REFUSING INSTRUCTION AS TO REASONABLE DOUBT OF FALSE PRETENSES CHARGED.—It was error for the court to refuse an instruction requested by defendant as follows: "If you should have a reasonable doubt in your minds as to whether the prosecuting witness parted with her money because of the representations set forth in the indictment, or any of them, or whether, on the other hand, she so acted by reason of and induced by other or different representations, then you should give the defendant the benefit of the doubt, and your verdict should be not guilty." (Id.)

125. GIST OF CHARGE — SUBSTANCE OF REPRESENTATIONS ESSENTIAL—OTHER INDUCEMENTS—MAIN CAUSE OF LOSS OF MONEY.—The false pretenses stated are of the gist of the offense charged, and the substance of them must be proved beyond a reasonable doubt. It is not necessary, however, that they shall be the sole inducement,

CRIMINAL LAW (Continued)

since other false pretenses may have co-operated therewith; but it is essential that the false pretenses charged should have been the main cause that operated in the mind of the prosecuting witness when she parted with her money. (Id.)

126. APPEAL—ARGUMENT—ERRORS NOT POINTED OUT IN BRIEF.—When counsel rely upon other errors in the giving or refusing of instructions, it is due to this court that the brief of the appellant should call attention to the facts and the law sufficient to show in what way the giving or refusing of the instruction injures the defendant appealing. (Id.)

127. EVIDENCE—FALSE REPRESENTATIONS AS TO NUGGET CHAIN—GUILTY INTENT—KNOWLEDGE OF FALSITY OF STATEMENTS CHARGED.—Evidence was admissible to show false representations by defendant to the prosecuting witness that a nugget chain shown her in the presence of a witness was made of nuggets taken from the mine. In this class of cases, evidence of similar offenses, involving the making of other false representations is admissible to show that he is aware of the falsity of the statements made by him in the particular case on trial. The law is liberal in allowing other false statements to be shown, for the purpose only of showing guilty intent, or guilty knowledge of the falsity of statements that the party is making. (Id.)

128. REOPENING CASE TO PROVE ADMISSIONS BY DEFENDANT—SPECULATION AS TO DEFENDANT BECOMING WITNESS.—The district attorney relying upon admissions made by defendant on a former trial should have proved them in chief; and the practice should not be tolerated of his reliance upon the uncertain event of the defendant taking the stand in his own behalf, so as to make them part of his case on cross-examination. In such case the district attorney did not stand in a favorable position to ask or invoke the discretion of the court to reopen his case, to prove such admissions; but the discretion of the court in allowing it is not passed upon, in view of reversal upon other grounds. (Id.)

129. ATTEMPT TO OBTAIN MONEY BY FALSE PRETENSES—SUPPORT OF VERDICT.—Upon appeal from a judgment of conviction of the crime of attempting to obtain money under false pretenses, and from an order denying a new trial, the testimony for the prosecution must be presumed to be true, and the facts proved are sufficient to support the verdict of guilty. (People v. Arberry, 749.)

130. FALSE PRETENSES BY ADVERTISING PHYSICIAN—FATAL HEART DISEASE—SUBSTANTIAL CONFORMITY OF INFORMATION TO PRELIMINARY COMPLAINT.—Where the false pretenses were made by an advertising physician that a young man had fatal heart disease, in an attempt to obtain money from him and his aunt, in the sum of \$200 to cure the same, it is held that the information charging the

CRIMINAL LAW (Continued).

same was in substantial conformity to the preliminary complaint before the committing magistrate. (Id.)

131. EXACT CONFORMITY OF INFORMATION TO COMPLAINT NOT ESSENTIAL.

Where the committing magistrate held the defendant to answer for the crime of attempting to obtain money by false pretenses, indorsed upon and referred to in the complaint, and the information charges the defendant with the same offense, the statute is sufficiently complied with. It is not contemplated that the information should contain a statement of the crime in the exact language or word for word the same as stated in the complaint filed before the committing magistrate. (Id.)

132. GENERAL STATEMENT OF OFFENSE IN ORDER OF COMMITMENT.—

Under section 872 of the Penal Code, the order of commitment is only required to state generally the nature of the offense with which the defendant is charged; and where the order of commitment here made stated generally the crime of obtaining money by false pretenses, and stated that there is sufficient cause to believe the defendant guilty thereof, the order sufficiently complied with the statute. (Id.)

133. DEMURRER SUSTAINED TO FIRST INFORMATION—TIME FOR NEW INFORMATION—REASONABLE TIME—EXTENSION—PRESENCE OF DEFENDANT.—

Where a demurrer was sustained to a first information, under section 1008 of the Penal Code, which provides for filing a new information, in the discretion of the court, but fixes no time therefor, the court may allow a reasonable time in which to file it. Where ten days were allowed in the presence of the defendant, and an extension of five additional days were allowed in his presumed presence, the contention of the defendant that the new information was invalid because not filed within the ten days is not sustainable. The defendant was not required to be present when the information was filed; and it would seem that an order extending time to file it is not a proceeding requiring his presence. (Id.)

134. NEW INFORMATION SUFFICIENT—DEMURRER PROPERLY OVERRULED.

The new information states facts sufficient to constitute a public offense, and a demurrer thereto was properly overruled. (Id.)

135. STATEMENT OF VALVULAR HEART DISEASE ONE OF FACT.—

The defendant's statement that the young man was suffering from a valvular disease of the heart was a statement of fact. It was not given as an opinion, but it was a statement voluntarily made by defendant to a person from the country ignorant of medicine and disease, and who had the right to rely upon a physician's honor and integrity. It is not pretended that the statement is true and it was made contemporaneously with an attempt to obtain an additional sum of \$200 from his aunt, who had recently paid the physician the same sum for a previous pretended cure of the same young man for an abscess of the prostate gland. (Id.)

CRIMINAL LAW (Continued).**136. ESTOPPEL OF DEFENDANT—ABSENCE OF MONEY PREVENTING CRIME.**

The defendant is estopped to say that the young man's aunt had no money, so that it would have been impossible to have accomplished the contemplated crime. (Id.)

137. ATTEMPT AND USE OF MEANS SUFFICIENT.—It is sufficient that defendant made the attempt to get the money, and used means apparently adapted to the end in view, although circumstances independent of defendant's will left the crime uncommitted. He made a false statement to the young man's aunt as to an ailment that had no existence, that he could cure it, that it was worth \$300 to cure it, but that he agreed to cure it for \$200. (Id.)**138. DISTINCTION AS TO RESPONSIBILITY BETWEEN HONEST AND DISHONEST PHYSICIANS.—**There is little danger of an honorable, upright physician being held to criminal account for a mistaken diagnosis, but where a dishonest physician or quack, who seeks opportunities to thrive and become wealthy off the ignorance and stupidity of his patients, has made a willfully false statement as to a mortal disease, solely with the view of obtaining money from the victim or his relatives, the law should deal severely with such physician. The fact that he is a licensed physician will not be allowed as a cloak to shield him from all responsibility for statements willfully made with the sordid view of obtaining the money of the unwary. (Id.)**139. LETTERS SENT BY DEFENDANT ADMISSIBLE.—**Letters sent by the defendant to the young man's aunt, which sufficiently connected the defendant therewith, and with the demands and statements therein made, were properly admitted in evidence. (Id.)**140. EVIDENCE OF PREVIOUS CRIME ADMISSIBLE—QUALIFIED PURPOSES.—**Evidence of the previously consummated crime of obtaining the money of the young man's aunt under the false pretense that he had an abscess of the prostate gland was admissible as a prior transaction between the same parties, not for the purpose of showing another and distinct crime, but to show the intent of the defendant in representing to the aunt that her nephew had valvular disease of the heart, and as bearing on the question whether or not his statement was made with the intent of procuring money and in violation of law. (Id.)**141. INSTRUCTIONS—PROPER CHARGE AND REFUSAL OF REQUESTS.—**It was not error to refuse requested instructions covered by the charge. It is held that there was no substantial error in the charge, or in the refusal of any requests, but that the court fairly and fully stated the substance of the law applicable to the evidence and the issue to be determined by the jury. (Id.)**142. UTTERING FICTITIOUS INSTRUMENT—PRIOR OFFENSE—ACTION TO SET ASIDE INFORMATION—ADMISSION OF NAME—RECORD UPON AP-**

CRIMINAL LAW (Continued).

PEAL—PRESUMPTION.—Where a defendant accused of uttering and passing a fictitious instrument for the payment of money to the order of W. F. Gordon, and indorsed by defendant in that name, which defendant admitted to be his true name, and also accused of a prior conviction for embezzlement under the same name, moved to set aside the information on the ground that he had not been legally committed for the prior offense, because he was committed therefor under the name of "William F. Gordon," if there were otherwise any merit in the motion, yet as there is no evidence in the record as to such commitment or its contents, or as to the name under which defendant was committed, it must be presumed that the district attorney performed his duty, and that such charge was founded upon the commitment by the magistrate. (People v. Gordon, 678.)

143. ABSENCE OF PREJUDICE—WITHDRAWAL OF PRIOR CONVICTION.—No prejudicial error could result from denying the motion to set aside the information for illegal commitment under the prior conviction, where, before sentence, the district attorney withdrew the charge of prior conviction. (Id.)

144. SUFFICIENCY OF INFORMATION—NONEXISTENCE OF FICTITIOUS MAKER "THEN OR THERE."—An information charging that on a specified date, "at the city and county of San Francisco," the defendant feloniously uttered and passed a fictitious instrument in writing fully set forth, and bearing the signature of "H. C. Watson," and stating: "Whereas in truth and in fact there was no such individual as H. C. Watson then or there in existence," was sufficient to enable the defendant or any person of common understanding to know what was intended, and sets forth the acts charged with such degree of certainty as to enable the court to pronounce judgment upon conviction. The word "then" is very comprehensive, and if there was no such person "then" in existence, there was certainly no such person "there," at the city and county of San Francisco. (Id.)

145. EXAMINATION OF PROSPECTIVE JURORS BY DISTRICT ATTORNEY—CROSS-EXAMINATION.—It is held that no error was committed by the district attorney in the examination of prospective jurors, and that nothing in such examination pointed toward any prior offense of defendant and that any suspicion of reference to such prior offense was wholly due to cross-examination of a juror made by the defendant. (Id.)

146. EVIDENCE—ADMISSION OF FICTITIOUS DRAFT—PLACING IN BANK FOR COLLECTION UNNECESSARY—USELESS ACT.—The admission in evidence of the false and fictitious draft, without showing that it had been placed in bank for collection, was not error. It was unnecessary to do the vain and useless thing of placing a false and

CRIMINAL LAW (Continued).

fictitious draft in a bank, which would not have been paid, and must have been returned by the bank. (Id.)

147. EXHIBIT FOR COMPARISON OF HANDWRITING—GUILTY KNOWLEDGE OF DEFENDANT.—The admission in evidence of the exhibit of a letter for the purpose of comparison of the handwriting of one W. C. Watson, who had been introduced to the witness, who was engaged in selling encyclopedias, by the defendant as a purchaser, and who signed a written order therefor in the presence of the defendant, who received a commission for such purchase, the letter stating that said Watson declined to receive the encyclopedia, was proper for the purpose specified, and as tending to show guilty knowledge on the part of defendant. (Id.)

148. REQUESTED INSTRUCTION AS TO NONEXISTENCE OF MAKER OF DRAFT—PROOF BEYOND REASONABLE DOUBT—PROPER REFUSAL.—A requested instruction that "the nonexistence of the individual H. C. Watson mentioned in the information . . . is one of the material issues involved in the case, and that "the nonexistence of said H. C. Watson must be proved beyond and to the exclusion of all reasonable doubt and to a moral certainty, and if there be any reasonable doubt as to whether or not there was in existence anywhere in the world such individual" on the date specified, "you must resolve that doubt in favor of the defendant, and find a verdict of not guilty," was properly refused. (Id.)

149. DEGREE OF PROOF REQUIRED.—The prosecution was not required to prove, nor were the jury bound to believe beyond a reasonable doubt, that there was no such person in the world as H. C. Watson at the time the writing was signed. It was only necessary to show to a common certainty that there was no such person in existence in the vicinity of, and connected with, the particular acts charged in the place and county where jurisdiction accrued. (Id.)

150. MISTAKE IN INITIALS OF NAME IN INSTRUCTION.—An evident mistake in the initials of the name of W. C. Watson, with whom defendant was connected in the encyclopedia transaction, in referring to the same by the court in an instruction as "H. C. Watson," which is made evident by what follows in the instruction, which would lead the jury to believe such reference, will not be considered as intended, or that the court was charging them, as matter of fact, that the writer of the draft was the same W. C. Watson referred to as giving the order for the encyclopedia. (Id.)

151. INSTRUCTIONS CORRECT AS A WHOLE—MISTAKE IN INITIAL NOT GROUND FOR REVERSAL.—Where the instructions, as a whole, fairly and fully instructed the jury as to the questions of law bearing upon the issues before them, the court will not, for imaginary errors, or errors in regard to getting one initial wrong in an instruction, or

CRIMINAL LAW (Continued).

in some other part of the record, reverse a case that appears to have been fairly tried. (Id.)

152. ORDER DENYING NEW TRIAL—APPEAL IN OPEN COURT FROM JUDGMENT AND ORDER—AMENDMENT AS TO METHOD—REVIEW ALLOWED. An appeal in open court from an order denying a new trial still exists under section 1237 of the Penal Code, and although, since the amendments of 1909 to sections 1239, 1240 and 1241 of that code, no special method is provided for taking such appeal, yet upon an appeal in open court from the judgment and order, the order after judgment presented in the record may be reviewed, under the terms of section 1259 of the Penal Code. (People v. Grider, 703.)

153. GRAND LARCENY—OBTAINING DIAMOND RING WITH INTENT TO STEAL—SUPPORT OF VERDICT.—Under an information for grand larceny committed by defendant in stealing a diamond ring worth \$550, where the evidence shows that the ring was obtained from the prosecutrix by defendant, as her agent, under a fraudulent assertion that it was necessary to obtain an exchange of plaintiff's lot for other lots, whose owner had proposed a different method of exchange, to defendant's knowledge, and neither proposed to exchange it for the ring nor knew of the obtaining of the same, it is held that from such facts, the jury may reasonably infer that at the time of obtaining the possession of the ring defendant feloniously intended to convert the same to his own use, and that the evidence is sufficient to support the verdict of guilty, as charged. (Id.)

154. THEORY OF CASE—OBTAINING POSSESSION BY FRAUD OR ARTIFICE—TITLE NOT PARTED WITH—INSTRUCTIONS.—The theory of the case for the prosecution was properly supported by instructions that the case for the people was limited to the taking of the ring by fraud, trick or device of defendant, and that "when by means of fraud or artifice, or any other kind of contrivance, the possession of personal property is fraudulently obtained from another, and the party so obtaining the possession acquires it with the intention of stealing the property when he gets possession of it, then the crime is larceny, provided the person from whom the property is taken still remains the owner of the property, and has not parted with the title," and that in order to convict the defendant, the jury must believe that the prosecutrix "did not at the time intend to part with her ownership in said ring, but was induced by fraud of the defendant to part with the possession," there being at the time "a felonious intention on defendant's part, in taking said ring, to steal said ring." (Id.)

155. EVIDENCE CONSISTENT WITH INSTRUCTIONS—STATEMENTS OF COMPLAINING WITNESS—Held, that the statements disclosed by the evidence, as made by the complaining witness, were consistent with

CRIMINAL LAW (Continued).

the crime of larceny, as defined by the instructions; and that these statements, with other evidence, justified the jury in concluding that defendant obtained the ring fraudulently from the complaining witness, knowing that she had no intention of parting with the title to him. They might have found from her statements that he obtained possession of the ring against her will, and retained its possession by fraud; and they certainly might find from the evidence that it was his intention from the beginning to obtain it by force or fraud, and to appropriate it to his own use. (Id.)

156. **NATURE OF LARCENY OF RING DISTINGUISHED.**—The nature of the larceny of the ring, as distinguished from the crime of false pretenses or embezzlement, is that its owner had no intention to part with her property therein to the person taking it with intent to steal it, although he may intend to part with the possession thereof. (Id.)

157. **NATURE OF CRIME OF FALSE PRETENSES.**—In the crime of false pretenses the owner does intend to part with his property in the money or chattel to the person to whom he delivers possession, but is induced to do so by the fraud or false pretenses of such person or someone on his behalf. (Id.)

158. **DISTINCTION BETWEEN "LARCENY" AND "EMBEZZLEMENT."**—As between a "larceny" of the character here involved and an "embezzlement," the chief distinction is the presence of the false and felonious intent with which the possession of the property is procured by the accused in the case of the larceny and the absence of this in embezzlement. (Id.)

159. **STATEMENTS NOT SHOWING "FALSE PRETENSES" OR "EMBEZZLEMENT BY AGENT."**—The statements made by the appellant, which are held consistent with the crime of larceny, do not show that she parted with the title by reason of false pretenses, nor that defendant came lawfully, as distinguished from fraudulently, into the possession of the property as the agent of the complaining witness. (Id.)

160. **VARIANCE NOT SHOWN—CODE PROVISION NOT RELIED UPON.**—Measured by proper distinctions, it is held that there was no variance between the proof and the charge of grand larceny in the information; and the use of the words, "fraud, trick or device," did not indicate that section 332 of the Penal Code was relied upon to secure a conviction. (Id.)

161. **PROPER REFUSAL OF REQUEST—HONEST BELIEF OF RIGHT TO RING.** The court properly refused to give a requested instruction as to the honest belief of the defendant that he was entitled to the ring, where the instructions given by the court in this matter were all that the defendant could ask. (Id.)

CRIMINAL LAW (Continued).

162. **MISCONDUCT OF DISTRICT ATTORNEY PREJUDICIAL—GROUND FOR REVERSAL.**—*Held*, that the misconduct of the district attorney in the asking of improper questions, and maintaining a general atmosphere of adverse comment, remark and running argument throughout the trial, showed that his presumed purpose was to prejudice the jury against the defendant, and constituted ground of reversal of the judgment and for a new trial. (Id.)
163. **ASKING IMPROPER QUESTIONS—TEST OF MISCONDUCT.**—When an improper question is asked by the district attorney, the test whether it was misconduct is, What was his purpose in asking the question? If it was to take an unfair advantage of the defendant by intimating to the jury something that either is not true or not capable of being proven in the manner attempted, then it is error. If he knows when he asks the question that an objection to it should or will be sustained, the error is not corrected, because the objection is sustained. (Id.)
164. **ASKING QUESTIONS OF DEFENDANT KNOWN TO BE WRONG.**—Where the prosecuting attorney asks questions of the defendant which he knows to be wholly wrong or without expectation of answers, or to be withdrawn if objected to, and the clear purpose is to prejudice the jury against the defendant in a vital matter by the *mere asking* of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have prejudiced the jury. (Id.)
165. **REMARKS OF TRIAL JUDGE NOT MISCONDUCT.**—*Held*, that none of the remarks of the trial judge constitutes misconduct on his part, and that his rebukes to counsel were proper under the circumstances appearing. (Id.)
166. **VITAL ELEMENT TO BE CONSIDERED IN CONNECTION WITH MISCONDUCT—QUESTION OF INJURY—PRESUMPTION—BURDEN OF PROOF.**—The vital element to be considered in connection with all irregularities or misconduct of court, counsel, party, or jury, is whether the substantial rights of the complaining party are materially affected thereby. This being shown, it will be presumed that he was injured, unless the contrary affirmatively appears. The burden is on the moving party to show the irregularity or misconduct, which might have prevented a fair trial; when this is done, the burden shifts to the successful party to show, as matter of fact, that the irregularity or misconduct did not affect the result. (Id.)
167. **NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.**—*Held*, that the showing of newly discovered evidence is not such as to warrant this court in saying that the trial court abused its discretion in not granting a new trial on this ground, whether it be considered

CRIMINAL LAW (Continued).

as evidence affecting the issues tried, or as impeaching evidence tending to weaken the testimony of the complaining witness. (Id.)

168. **FORGERY—ABSENCE OF ARGUMENT FOR APPELLANT.**—Upon appeal from a conviction for forgery, where no further proceeding appears to have been taken by appellant since the taking of the appeal, and an examination of the record shows that no reason exists for an interference with the action of the trial court, the judgment and order appealed from must be affirmed. (People v. Stanley, 299.)
169. **INCEST WITH SISTER—SUFFICIENCY OF INFORMATION—ABSENCE OF DEMURRER.**—An information, to which no demurrer was filed, which charges the defendant with incest, and substantially follows the language of the statute, sufficiently avers that the prosecutrix was the sister of the defendant by stating that "The said John G. Heivner . . . did willfully, unlawfully and upon the person of one Kate Curless, a sister of the defendant, etc." It is clear that the defendant was thereby informed that Kate Curless was his sister; and it could not have been understood in any other way. Even if it were conceded that the allegation is deficient, it could be attacked only by special demurrer. (People v. Heivner, 768.)
170. **EVIDENCE—VOLUNTARY CONFESSION BY DEFENDANT TO OFFICERS.**—The confession of the defendant made in the presence of the sheriff and district attorney was properly admitted in evidence as voluntary, where both of those officers testified that no inducement was offered or coercion used, and they both relate all that occurred at the time, and it appears from their testimony that only an inference can be drawn therefrom favorable to the ruling of the court admitting the confession in evidence. (Id.)
171. **ADMONITION OF SHERIFF TO "TELL THE TRUTH."**—The admonition of the sheriff to the defendant to "tell the truth" is not sufficient to avoid the confession. (Id.)
172. **ABSENCE OF "ARTIFICE, FALSEHOOD OR DECEPTION."**—There is no evidence that the sheriff or district attorney took any advantage of the defendant, or used any "artifice, falsehood or deception" to obtain from him any statement; but their conduct seems to have been altogether decorous, and not violative of any right of appellant. (Id.)
173. **CORRECTNESS OF INSTRUCTIONS.**—It is held that the court committed no error in giving or refusing instructions; and that every principle of law applicable to the charge against the defendant and to the evidence, and necessary for the enlightenment of the jurors, is found in the instructions given by the trial judge. (Id.)
174. **SUPPORT OF VERDICT.**—The positive testimony of the prosecutrix, and the confession of the defendant, together with some circumstantial evidence, afford ample support for the verdict. (Id.)

CRIMINAL LAW (Continued).

- 175. LEWD AND LASCIVIOUS CONDUCT WITH CHILD—NONAPPEARANCE FOR APPELLANT—ABSENCE OF ERROR—AFFIRMANCE.**—Where a defendant convicted of the crime of lewd and lascivious conduct with a child, as provided in section 288 of the Penal Code, has appealed to this court, and no brief has been filed by appellant, and no appearance entered in his behalf for oral argument, and it appears from an examination of the record that the evidence abundantly supports the verdict, that the instructions are correct, and that no error prejudicial to the substantial rights of appellant appears to have been committed, the judgment and order appealed from must be affirmed. (People v. Dunning, 300.)
- 176. MURDER—SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT.**—Where the defendant charged with murder in the first degree was found guilty as charged, and upon appeal claimed insufficiency of the evidence to sustain the verdict, and the evidence all tended to show that there was a common understanding between defendant and his brother, regarding hostility of the deceased manifested especially toward defendant's brother, and that one of them committed the crime, and two eye-witnesses to what occurred testified that defendant said: "What's with my brother is with me," and that defendant then fired the fatal shot, the evidence is sufficient to support the verdict. (People v. Verduzco, 789.)
- 177. PROVINCE OF JURY—CREDIBILITY OF WITNESSES—PROBABILITY OF TESTIMONY.**—Where there is nothing in the testimony of the eye-witnesses to the homicide not susceptible of reasonable explanation in the light of all the evidence, it was wholly within the province of the jury to pass upon their credibility, as well as the probability of their testimony. (Id.)
- 178. INSTRUCTIONS—AIDING AND ABETTING HOMICIDE.**—Where the defendant claimed that his brother, who escaped, fired the fatal shot, and the prosecution, besides relying upon proof that defendant fired the same, relied also upon a prior understanding between defendant and his brother to make a felonious assault upon deceased and to aid and abet each other in the homicide, the court properly gave instructions based thereon, to the effect that if they were satisfied beyond a reasonable doubt that defendant and his brother did make such assault, "with the defendant and his brother aiding and abetting each other therein, and during such assault Soto was shot, killed and murdered by one of said assailants, according to a common prior understanding, then under such circumstances, . . . no matter which of the two assailants fired the alleged fatal shot, both are equally guilty under the law." (Id.)
- 179. INSTRUCTION AS TO REASONABLE DOUBT.**—An instruction as to "reasonable doubt" which showed no material departure in phraseology or substance from the frequently approved instruction given by Judge Shaw in the Webster case, was without error. (Id.)

CRIMINAL LAW (Continued).

- 180. INSTRUCTION AS TO DUTY OF EACH JUROR—CONSULTATION—AGREEMENT.**—The court did not err in an instruction the essence of which is that each juror should decide for himself; but that it is his duty to consult with the other jurors, and counsel with them “with the view of reaching an agreement, if they can without violence to their individual understanding of the evidence and instructions of the court”; but if convinced that his views are erroneous, a juror should defer to the views or opinions of the other jurors. (Id.)
- 181. MURDER—SUPPORT OF VERDICT FOR MANSLAUGHTER—CONFLICTING EVIDENCE—PROVINCE OF JURY—REVIEW UPON APPEAL.**—When a defendant charged with murder was found guilty of manslaughter, and there is testimony in the record amply sufficient to support the verdict, the fact that the evidence was conflicting presented a question solely for the jury. It is not the province of this court to pass upon conflicting evidence where it is sufficient in substance to support the verdict. (People v. Lee, 48.)
- 182. EVIDENCE OF VENUE.**—The evidence of venue is sufficient if it is shown by the evidence, taken all together, that the crime was committed in the county where the venue is laid. (Id.)
- 183. TESTIMONY OF POLICE OFFICER—IMPROPER CROSS-EXAMINATION—STATEMENT BY DECEASED.**—Where in the testimony in chief of a police officer there was no allusion to the deceased, his cross-examination in reference to a statement made by the deceased in the interest of the defendant was properly disallowed. (Id.)
- 184. DYING DECLARATION OF DECEASED.**—If the deceased had made a dying statement favorable to the defendant, which was part of the *res gestae*, the defendant might prove it independently; but he could not prove it by improper cross-examination. He did not call the officer, as his own witness, to prove such declaration. (Id.)
- 185. WITNESS FOR DEFENDANT—DECLARATION NOT SHOWN TO BE DIRECT OR PART OF RES GESTAE.**—When a witness was called to prove a statement by the deceased after he had been placed under arrest, which was not shown to be a dying statement, or part of the *res gestae*, it was properly excluded as not appearing to be material or relevant. The mere fact that the witness heard deceased make a statement of the trouble is too indefinite to show that it was admissible or would throw any light upon the case. (Id.)
- 186. INSTRUCTION AS TO MANSLAUGHTER—INVOLUNTARY MANSLAUGHTER—LAW OF SELF-DEFENSE NOT QUALIFIED.**—An instruction as to manslaughter given in the language of section 192 of the Penal Code, though it might well have omitted the law of involuntary manslaughter, yet was not misleading, where such instruction was not so given as to qualify the law of self-defense, and other instructions were fully given as to the right of self-defense and the right of defendant to act on appearances. (Id.)

CRIMINAL LAW (Continued).

187. **MURDER—SUPPORT OF VERDICT FOR MANSLAUGHTER.**—Upon trial of a charge of murder, where the wife of the deceased, corroborated by her daughters, testified for the prosecution that defendant deliberately fired the fatal shot, without necessity, though her testimony was inconsistent in some particulars, and the evidence for defendant showed that defendant and a codefendant were deputy fish and game commissioners who had arrested the deceased for unlawful fishing, who endeavored to reach for his gun under his wagon, and was commanded by the codefendant with a drawn pistol to stop, whereupon deceased seized hold of such pistol, and tried to wrest it from the codefendant's hand, and in the struggle the codefendant shot him twice with the pistol, and the defendant fired another shot, which hit the deceased, and shortly afterward he died, a verdict against the defendant for manslaughter was sufficiently supported. (*People v. Bond*, 175.)
188. **PROVINCE OF JURY—CREDIBILITY OF WITNESSES—WEIGHT OF EVIDENCE—REVIEW UPON APPEAL LIMITED TO INHERENT IMPROBABILITY.**—The jurors in such case are the exclusive judges of the credibility of the witnesses and of the weight of the evidence, and appellate courts are bound by the verdict, unless it appears that the testimony in support of the verdict is so inherently improbable as to demand its rejection. *Held*, that it cannot be said that the wife of the deceased, as a witness, was not honestly mistaken in reciting some of the less important details of the occurrence, or that her story was not substantially correct as to the vital points surrounding the homicide. (*Id.*)
189. **FIRING OF FATAL SHOT—QUESTION FOR JURY.**—It was a question for the jury who fired the fatal shot; and if there is any evidence in the record from which a rational inference might be drawn that defendant fired the fatal shot, the verdict is conclusive on that question. *Held*, that it cannot be said in view of the evidence in the record that the verdict against defendant on that question was unwarranted. (*Id.*)
190. **THEORY OF AIDING AND ABETTING CRIME.**—Upon the possible theory that the codefendant fired the first shot, which caused a flesh wound, that defendant fired the second shot which contributed to the fatal result by wounding defendant and making him loosen his hold, and that the codefendant fired the fatal shot, the defendant was properly found guilty as having aided and abetted the crime. (*Id.*)
191. **COMMUNICATION OF PURPOSE OF CODEFENDANT TO DEFENDANT NOT REQUIRED.**—It was not necessary that the codefendant should have communicated to the defendant his purpose to fire the fatal shot to make the defendant chargeable as a principal. If, with the knowledge of the defendant, the codefendant feloniously made the assault, and the defendant voluntarily assisted in taking the life

CRIMINAL LAW (Continued).

of the deceased, although he did not fire the fatal shot, both would be equally guilty, and the defendant would be an aider and abetter of the crime committed. (Id.)

192. ABSENCE OF CONSPIRACY—AIDING OR ENCOURAGING CRIME.—Although there was no conspiracy to commit an offense, still if one person commits an offense, and the accused was present and knew the intention of the other, and aids by acts or encourages by words or gestures the person engaged in the commission of the offense, he would be guilty of the offense committed. (Id.)

193. RATIONAL CONCLUSION OF GUILT FROM EVIDENCE—SUFFICIENCY OF EVIDENCE TO CONVICT.—Since a rational conclusion may be drawn from the evidence either that the defendant fired the fatal shot, or wrongfully contributed to the death of the deceased, or that the codefendant wrongfully made a felonious attempt to kill the deceased, and that defendant, with knowledge of such assault, aided in the consummation of the unlawful purpose and therefore became an aider and abetter of the crime, his contention as to the insufficiency of the evidence to convict him cannot be upheld. (Id.)

194. INSTRUCTIONS—ABSENCE OF PREJUDICIAL ERROR.—It is held that there was no prejudicial error in the giving or refusing of instructions; that all the elements of every degree of crime involved in the offense charged were fully defined; that nothing was omitted necessary for the information of the jury; that there was no conflict in the instructions when construed together; and that the theory of the defense, as formulated for the defendant appealing, was fully presented to the jury in the instructions. (Id.)

195. JUSTIFIABLE HOMICIDE BY ARRESTING OFFICER—CONSISTENT INSTRUCTIONS—CONSTRUCTION WITH CHARGE.—It is held that instructions as to the law of justifiable homicide by an arresting officer were not inconsistent, when they were to the effect that if the officer is authorized to make the arrest, he may use whatever force is necessary to accomplish his purpose and overcome whatever resistance may be offered, and that if the resistance was of such a nature that it appeared to the officer as a reasonable man that he or anyone acting with or under him was in danger of receiving great bodily harm, he would be justified in killing the prisoner; but that this right appearing to him as a reasonable man to overcome all resistance, even to the taking of life, cannot be used as a subterfuge to take life without necessity; and that any ambiguity therein is fully cured by the remaining charge of the court, completely expressing all the conditions to which the evidence relates and under which the right to take the life of the deceased existed. (Id.)

CRIMINAL LAW (Continued).

196. **EVIDENCE—REMNANTS OF SHIRT WORN BY DECEASED.**—The court did not err in admitting in evidence the remnants of the shirt worn by deceased at the time of the homicide, which had been in the custody of the sheriff from the time when it was removed from the body. If appellant relied upon the absence of a proper foundation for its admission, he should have called the attention of the court thereto, or have questioned the witness concerning it. (Id.)
197. **TESTIMONY OF SHERIFF TO DIRECTION OF FATAL BULLET.**—The court properly allowed the testimony of the sheriff, who had inspected the body after the homicide, and was competent to describe what he saw, that a bullet had entered the left side of the deceased, and passed through his body and came out on the right side; and where that fact appears without conflict, the testimony, in view of the conceded facts, was favorable to the appellant. (Id.)
198. **OPINION EVIDENCE—AGE OF DECEASED.**—The court properly allowed a witness long familiar with the deceased to give his opinion as to his age. The rule seems to be that age is provable by the inference of any competent observing witness. (Id.)
199. **OFFERED EVIDENCE TO SHOW NONWORKABLE CONDITION OF FISHING LADDER — INFERENCE OBLIATED BY INSTRUCTION.**—Any inference from offered evidence to show the nonworkable condition of a fishing ladder within the prohibited distance from which defendant was fishing that it would not be a misdemeanor to fish there is obviated by an instruction that "the fish commissioners placed deceased under arrest for the violation of the game and fish laws of California committed in their presence." (Id.)
201. **EVIDENCE OF TREATMENT OF ANOTHER PERSON ARRESTED.**—The court properly excluded offered evidence to show the manner in which the game and fish commissioners had treated another person previously arrested for violating the fish law, as not being pertinent to disprove the commission of the crime for which the defendant was being tried. (Id.)
202. **CROSS-EXAMINATION OF CODEFENDANT—ABSENCE OF PREJUDICIAL ERROR.**—It is held that no prejudicial error appears upon the cross-examination of the codefendant as to his evidence upon the preliminary examination; that preliminary questions were properly allowed without producing the transcript, and that further answers were so satisfactory that no prejudice could possibly have resulted to the defendant; and that there was no prejudicial error upon any subject matter of his cross-examination. (Id.)
203. **MANSLAUGHTER—APPEAL TAKEN PRIOR TO CODE AMENDMENT —WRITTEN SERVICE OF NOTICE ESSENTIAL.**—Where the judgment convicting appellant of manslaughter, and the order denying him a new trial were rendered prior to the taking effect of the amend-

CRIMINAL LAW (Continued).

ment to the Penal Code allowing an oral notice of appeal, the only method of taking the appeal to this court from such judgment and order was by the service and filing of a written notice of appeal. (People v. Reese, 327.)

204. EFFECT OF FAILURE OF APPELLANT TO APPEAR.—Where the appellant has filed no brief or points and authorities, this omission would alone be sufficient to justify the dismissal of the appeal, if one had been taken. (Id.)

205. WANT OF JURISDICTION OF APPEAL—CERTIFICATE OF CLERK OF SUPERIOR COURT—TRANSCRIPT STRICKEN FROM FILES.—Where the clerk of the superior court certifies that no written notice of appeal is on file in that court, and that no notice of appeal of any kind in this case is found upon its records, it clearly appears that appellant has failed to pursue the course required when the judgment and order appealed from were rendered, and that this court is without jurisdiction to review the record filed here, and it will order the transcript to be stricken from the files of the court. (Id.)

206. MURDER—VERDICT FOR MANSLAUGHTER—SELF-DEFENSE—SUPPORT OF VERDICT.—Upon a prosecution for murder, where the verdict was for manslaughter, and the evidence shows that after the defendant and the deceased had quarreled in a saloon, the defendant went and armed himself, and on his return to the saloon fired three shots into the body of the deceased while he was unarmed, from which he died, the evidence was sufficient to sustain the verdict of the jury that the killing was unlawful and not in necessary self-defense. (People v. Webster, 348.)

207. SELF-DEFENSE—QUESTION FOR JURY.—Whether the killing was done in self-defense was a question peculiarly for the jury; and it is not the province of this court to interfere with their verdict on that question, which is final and conclusive. (Id.)

208. INSTRUCTION—JURY NOT "FULLY SATISFIED" OF GUILT—"REASONABLE DOUBT."—An instruction that, "Laws are made and juries called to investigate cases as much for the protection of the innocent as for the punishment of the guilty. If, therefore, after a careful consideration of all the evidence, you are not fully satisfied that the defendant is guilty, you must say so by your verdict. By so doing the object of the law will be as fully attained as if you rendered a verdict of guilty," is not prejudicial to appellant, because of the use of the words "fully satisfied," instead of the words "satisfied to a moral certainty and beyond a reasonable doubt." Passing the point that the instruction is favorable to the defendant, where it appears that the law of "reasonable doubt" was often and clearly stated, the jury could not have misunderstood his rights in that regard. (Id.)

CRIMINAL LAW (Continued).

- 209. INSTRUCTION AS TO "CONSEQUENCES OF VOLUNTARY ACT"—PRESUMED INTENTION.**—The court correctly instructed the jury that "a person must be presumed, and is presumed, to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts; and therefore, if one person assaults another violently with a dangerous weapon, likely to kill, and which does in fact destroy the life of the person assailed, the natural presumption is that such assailant intended death or other great bodily harm. In the absence of evidence to the contrary, this presumption must prevail." (Id.)
- 210. JUSTIFIABLE HOMICIDE—INACCURATE INSTRUCTION NOT PREJUDICIAL—FULL INSTRUCTIONS AS TO "APPARENT NECESSITY."**—An instruction that "to justify homicide on the ground of self-defense, it must appear that the danger was so urgent and pressing that, in order to save the life of the slayer or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and it must appear the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline further struggle," though it is inaccurate, and should not have been given, yet the giving of it is not prejudicial, where the right of the defendant to act upon "apparent necessity" was fully and completely recognized in numerous other instructions. (Id.)
- 211. INSTRUCTIONS AS TO SELF-DEFENSE TOO BROADLY STATED.**—*Held*, that requested instructions as to the right of self-defense against an "unlawful attack," and assuming that a person can deliberately persist in the mere exercise of a technical right, when he has reason to know that by so doing he will be placed under the necessity of killing a person in self-defense, were too broadly stated, and were properly refused. (Id.)
- 212. SIMPLE ASSAULT NOT JUSTIFYING HOMICIDE.**—A simple assault would be an "unlawful attack," yet it would not justify a homicide. (Id.)
- 213. "UNLAWFUL ATTACK" WARRANTING SELF-DEFENSE.**—The only "unlawful attack" which would warrant the defendant in killing his assailant is such an attack as would put him, as a reasonable person, in fear of being killed or of receiving great bodily harm; any "unlawful attack" falling short of this would be unavailable as a defense to a charge of homicide. (Id.)
- 214. PERSISTENCE IN MERE TECHNICAL RIGHT—SELF-DEFENSE NOT PERMISSIBLE.**—A person cannot deliberately persist in the immediate exercise of a mere technical right when he has reason to know that by so doing he will be placed under the necessity of killing a human being in self-defense. (Id.)
- 215. MURDER—REFUSAL OF INSTRUCTION—CHARACTER OF DECREASED—EVIDENCE NOT RETURNED—PRESUMPTION UPON APPEAL.**—Where no

CRIMINAL LAW (Continued).

evidence is returned upon appeal, it cannot be held prejudicially erroneous, under all circumstances, to refuse an instruction requested by the defendant as to the character of the deceased. For the purpose of supporting the ruling, this court must presume that no evidence was introduced relating to the character of the deceased. (*People v. Howland*, 863.)

216. INSTRUCTION AS TO SELF-DEFENSE INVOLVING EVIDENCE.—When an instruction as to self-defense involves the question whether or not the defendant was called upon in good faith to decline any further struggle, which could only be determined from evidence not returned, it cannot be said to involve error. (*Id.*)

217. INSTRUCTION USING WORD "MURDER"—ABSENCE OF EVIDENCE.—In the absence of the evidence, it cannot be said that the use of the word "murder," in an instruction instead of "killing," prejudiced the defendant, since his defense may have been an alibi, and he may have admitted that a "murder" was committed. (*Id.*)

218. PREJUDICIALLY ERRONEOUS INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE—MATTERS OF FACT.—A long argumentative instruction as to the advantages of circumstantial evidence as compared with direct evidence, which contains practically all of the objectionable comments held prejudicially erroneous, in *People v. Vereneseneckockhoff*, 129 Cal. 497, and which charged the jury as to matters of fact, was improper in any conceivable state of facts not negated by the instruction itself, and is ground of reversal. (*Id.*)

219. DUTY OF TRIAL JUDGE.—The trial judge must not in his charge, or during the trial, directly or indirectly, assume the guilt of the accused, nor use any language from which the jury can legitimately infer what the views of the judge are upon the issues of fact submitted to them. (*Id.*)

220. RELATIVE MERITS OF CIRCUMSTANTIAL AND DIRECT EVIDENCE—INSTRUCTION AS TO MATTER OF FACT.—The law declares nothing as to the relative merits of direct and circumstantial evidence. The court cannot argue their relative merit to the jury; and an instruction declaring no settled rule of law, but charging the jury as to matter of fact, is violative of section 19 of article VI of the constitution. (*Id.*)

221. STATEMENT NOT OF INFERENCE DRAWN BY JURY.—To tell the jury that circumstantial evidence is not likely to be fabricated, and that it has a great advantage over direct evidence, cannot be accepted as a statement of an inference that the jury would be sure to draw. (*Id.*)

222. STATEMENT OF ABSENCE OF DIRECT EVIDENCE.—Where the jury were informed by the instruction itself that there was no direct evidence of any eye-witness of the homicide, it cannot be assumed

CRIMINAL LAW (Continued).

- that the case for the prosecution was based upon direct evidence, and that the instruction was not prejudicial to the appellant. (Id.)
- 223. MURDER—SUPPORT OF VERDICT.—***Held*, that the evidence is clear and convincing that the defendant charged with murder was justly convicted of murder in the first degree; that the defendant may consider himself fortunate that the jury fixed the penalty at life imprisonment, instead of leaving the severer penalty to be imposed by the court; that there is no pretense of excuse or justification for the homicide; and that the case for the people rested upon the dying declaration of the deceased, the testimony of eye-witnesses to the shooting, and the defendant's attempt to escape from jail after his arrest. (People v. Petruzo, 569.)
- 224. DYING DECLARATION OF AUSTRIAN—INTERPRETER—TRANSLATION BEFORE SIGNATURE—HEARING IN ENGLISH UNDERSTOOD—ADMISSION.** Where the dying declaration of the deceased was first given in the Austrian language to an interpreter, and it was formally written down in English, and read to and understood by him before signing it, and he had first been informed by the attending physician that he would die, and the declaration stated that it was made in fear of death, and believing that he was about to die, and stated the details of the shooting by defendant and his companion, and no objection was made thereto, it was properly admitted. (Id.)
- 225. TESTIMONY OF PHYSICIAN—CERTAINTY OF DEATH—OPINION—POINTING OUT SHOOTING PARTIES.—**Where the attending physician, before the dying declaration was admitted, testified that he told deceased, through another party, that he would die, and when his opinion was asked as to his living or dying at that time, stated, over objection, that when he so told the deceased, his opinion was that he would certainly die, the answer was without prejudice. He further testified that when defendant and his companion were brought before deceased he pointed them out as the parties who did the shooting. (Id.)
- 226. CROSS-EXAMINATION OF PHYSICIAN—SPEAKING THROUGH INTERPRETER—INCOMPETENT HEARSAY.—**Where the physician testified on cross-examination that all he had to do with the defendant was done through the interpreter, and the interpreter only spoke to him, his testimony as to what the interpreter said to him was incompetent hearsay. (Id.)
- 227. SETTLED RULE—INCOMPETENT EVIDENCE—NECESSARY TRANSLATION.** It is a well-settled rule that a witness is incompetent to testify to a declaration made by a party when it is necessary to have it translated before it can be understood by the witness. Such testimony is clearly hearsay, as the witness necessarily testifies to what the interpreter declares the other party said. (Id.)
- 228. WAIVER OF OBJECTION—MOTION TO STRIKE OUT.—**Where no objection was taken to the original evidence of the physician that he in-

CRIMINAL LAW (Continued).

formed the deceased through another party that he could not live, objection to such evidence is waived and cannot be urged for the first time on motion to strike it out. (Id.)

229. TENABLE TESTIMONY AS TO POINTING OUT PARTIES—SUBSTANCE OF DYING DECLARATION—EVIDENCE AS TO USE OF ENGLISH.—The testimony as to the pointing out by the deceased of the parties who shot him, when brought before him, was tenable as proving by ocular demonstration the substance of his dying declaration. Other witnesses further testified that he identified them in the use of the English language. (Id.)

230. FIRING OF FATAL SHOT—DISAGREEMENT OF WITNESSES IMMATERIAL—AIDING AND ABETTING.—It is immaterial that all the witnesses did not agree that defendant alone fired the fatal shot, since, whether he did so or only aided and abetted in the consummation of the crime, there was ample evidence, on either theory, to justify the conviction of the defendant. (Id.)

231. DISTRICT ATTORNEY NOT BOUND TO ELECT—PROVINCE OF JURY.—The district attorney was not required to elect one or the other of these positions on which to base his claim for a verdict. His duty was done when he presented the evidence; and it was for the jury, under proper instructions, to follow the witnesses whose testimony carried conviction. In such case, the witnesses testified to only one transaction and one offense, and under the law he was a principal, and could be convicted of murder under either contingency. (Id.)

232. DECLARATION ABOUT SHOOTING DAY AFTER HOMICIDE—PART OF RES GESTAE.—While it is true that the facts, circumstances or declarations which grow out of the principal fact and serve to illustrate, qualify or explain it constitutes the *res gestae*; still that term is not so comprehensive as to include declarations made on the day following the homicide and many hours thereafter, as to what was then said about the shooting which took place the night before. (Id.)

233. INSTRUCTION AS TO AIDING AND ABETTING “UNLAWFUL ACT.”—An instruction that if the jury “believes, upon the evidence, to a moral certainty and beyond a reasonable doubt that defendant was present aiding and abetting in the commission of an unlawful act, and that in the commission of said unlawful act deceased was killed, it will be your duty to bring in a verdict of guilty of murder in the first degree,” was abstractly erroneous; but where the only “unlawful act” proved is the deliberate attempt to take the life of the deceased, unless there be some evidence of an attempt to commit robbery, the instruction is obviously without prejudice. (Id.)

234. INSTRUCTION ABSTRACTLY ERRONEOUS NOT ERRONEOUS IN FACT.—An instruction may be abstractly erroneous as a general proposition and yet not erroneous when considered in connection with the particular case and the facts to which it relates. (Id.)

CRIMINAL LAW (Continued).

235. **INSTRUCTION OF COURT AS TO "UNLAWFUL ACT"—AIDING AND ABETTING MURDER.**—That the court intended by the words "aiding and abetting an unlawful act," to refer to the act of murder, is shown by an instruction given at defendant's request, that "it must be proved to a moral certainty and beyond all reasonable doubt that the person charged as an aider and abetter of his malice aforethought was present, aiding and abetting his principal in the act of taking the life of the deceased," and that otherwise "you cannot convict him of murder." (Id.)
236. **INSTRUCTIONS AS TO "MOTIVE."**—The court did not err in an instruction that if the jury were satisfied beyond a reasonable doubt that the crime of murder has been committed and that defendant is guilty thereof, "then the motive for its commission is unimportant and not material." But that the court did not minimize "motive" appears from another instruction that the absence of motive "is a circumstance in favor of innocence," and that when there is "reasonable doubt as to who committed it, affords a strong presumption of innocence." (Id.)
237. **INSTRUCTION AS TO ATTEMPT TO ESCAPE NOT PREJUDICIAL.**—Where there was evidence that after the arrest of the defendant, while he was in the county jail, he attempted to escape, an instruction to the jury that if they found this to be true from the evidence, "that fact alone is not evidence of guilt, but it is a circumstance that the jury may well consider in determining the guilt or innocence of the defendant," is not prejudicial to the defendant from the use of the word "well," but it is more favorable to defendant than he would expect, in declaring that the attempt to escape, "of itself, is not evidence of guilt," but of this defendant appealing cannot complain. (Id.)
238. **INSTRUCTION AS TO GUILT FOLLOWING INTENTION TO KILL NOT PREJUDICIALLY MISLEADING.**—An instruction that "every person is presumed to intend what his acts indicate his intention to have been, and if you find from the evidence beyond a reasonable doubt that defendant fired a loaded pistol at the deceased and killed him, the law presumes that defendant intended to kill the deceased, and unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless," though it was error to instruct the jury that guilt would follow from such intention, yet, in view of the facts and circumstances of the case, and the other instructions, the jury could not have been misled or prejudiced by the instruction. (Id.)
239. **REQUEST PROPERLY REFUSED—ABSENCE OF CONSPIRACY—DOUBT AS TO FIRING FATAL SHOT—OMISSION OF AIDING AND ABETTING.**—A requested instruction by defendant that "if a person is killed by a bullet fired from a pistol, and two persons each at the same time fire loaded pistols at him, and one of the persons is on trial and

CRIMINAL LAW (Continued).

there is no conspiracy proved between the two persons who fired, and the jury are in doubt as to which shot killed the deceased, the defendant is entitled to the benefit of that doubt, and should be acquitted," was properly refused as precluding the jury from considering the theory that the defendant was an aider and abetter, although there might be no conspiracy between them. (Id.)

240. REQUESTS COVERED BY CHARGE.—It was not error to refuse requested instructions, where the principles embodied therein, so far as correct, were covered by the instructions given by the court in its charge. (Id.)

241. MURDER—IMPANELMENT OF JURY—EXHAUSTION OF JURORS IN DEPARTMENT PANEL—COMPLETION FROM CODEPARTMENT.—In the impanelment of a jury upon a criminal trial for murder, where the impanelment of the jury was incomplete and the panel was exhausted in the department of the superior court in which the trial was had, the panel may be completed from the trial jury panel summoned in another department of the same superior court. (People v. Loomer, 654.)

242. SUPPORT OF VERDICT—CONFLICTING EVIDENCE.—Where the defendant relied upon self-defense, and the evidence was conflicting, and the testimony for the people tends to prove the guilt of the defendant, this court will not disturb a verdict finding the defendant guilty of murder in the second degree. (Id.)

243. DEFORMITY OF DEFENDANT—PROOF AT TRIAL—PROPER REFUSAL OF MOTION TO EXHIBIT UNCLAD BODY TO JURY.—Where the deformity of the body of the defendant in having one limb shorter and smaller than the other was proved at the trial by his own testimony and by his physician's uncontradicted testimony, the court did not err in refusing his motion for leave to exhibit his unclad body to the jury for the purpose of exhibiting the deformity so proved. The substantial rights of the defendant were not prejudiced by such ruling. (Id.)

244. REQUESTED INSTRUCTIONS SUBSTANTIALLY EMBODIED IN CHARGE.—The court did not err in refusing instructions requested by the defendant which, so far as correct, were substantially embodied in the instructions given, which, taken as a whole, are not only full and complete, but well calculated to protect and guard the defendant in securing a fair and impartial consideration at the hands of the jury. (Id.)

245. PROPER INSTRUCTION AS TO THREATS OF DECEASED.—In view of the evidence, it is held that the court properly instructed the jury that "previous threats of the deceased toward the defendant, however violent they may have been, are not of themselves sufficient to justify the defendant in slaying the deceased; to excuse or justify him, he must have acted under an honest belief that it was necessary at the

CRIMINAL LAW (Continued).

time of taking the life of the deceased, in order to save his own or himself from great bodily injury, and it must appear that there was reasonable cause to excite this apprehension on his part." (Id.)

246. THREATS OF DECEASED AGAINST FATHER OF DEFENDANT—DUTY OF DEFENDANT TO REQUEST INSTRUCTIONS.—Where there was some evidence tending to show threats and acts of hostility against the father of the defendant, between whom and deceased there was a dispute about a crop of corn which deceased was cutting, as well as a dispute with defendant concerning the same crop, if defendant wished instructions given concerning his defense of his father, as well as of himself, it was his duty to request such instructions, if he deemed the evidence sufficient to warrant the same. (Id.)

247. REQUEST AS TO JUSTIFIABLE HOMICIDE.—When the court, at defendant's request, gave an instruction as to justifiable homicide, in the language of section 197 of the Penal Code, and he did not ask further elaboration of that section, nor any additional instructions concerning defense of his father, his complaint that the court failed to so instruct cannot now be entertained upon appeal. (Id.)

248. PROPER REQUEST AS TO DUTY OF EACH JUROR—REASONABLE DOUBT. A requested instruction that: "In criminal cases, the law requires the concurrence of twelve minds in the conclusion of guilt. Before a verdict of guilty can be legally rendered, each member of the jury must be satisfied beyond a reasonable doubt of the guilt of the defendant. Therefore, if any one of the jurors, after having considered all of the evidence, and having consulted with his fellow-jurors, should entertain a reasonable doubt of the guilt of the defendant, as charged in the information, he should not, under his oath, consent to a verdict of guilty. Each juror should act upon his individual judgment upon the facts of the case, and he is in duty bound not to surrender his conviction if he entertains a reasonable doubt as to the guilt of the defendant, merely because the other jurors entertain no doubt as to his guilt"—was proper, and should have been given. (Id.)

249. IMPROPER REFUSAL OF REQUEST—ABSENCE OF PREJUDICIAL ERROR—INSTRUCTIONS GIVEN—POLLING OF JURY.—The improper refusal of such request was not, under the circumstances of this case, an error which prejudiced the substantial rights of the defendant, and therefore, under the provisions of section 1258 of the Penal Code, it should be disregarded. Where the jury were fully instructed as to the law of "reasonable doubt," and as to the "presumption of innocence," and other instructions were given which were calculated to impress upon each juror the duty which devolved upon him, to be guided by the evidence and the instructions of the court, and each juror was polled when the verdict was rendered, it cannot be presumed that any member of the jury rendered his verdict in violation of his oath and the instructions of the court. (Id.)

CRIMINAL LAW (Continued).

- 250. PLACING WIFE IN HOUSE OF PROSTITUTION—CONVICTION—INSUFFICIENT BRIEF UPON APPEAL.**—Where, upon appeal from a judgment of conviction of a charge that defendant placed his wife in a specified house of prostitution and permitted her to remain there, appellant in his brief merely states that defendant was convicted on the uncorroborated testimony of his wife, which was contradicted in every particular, and "it then became a question of veracity for the jury to determine," and then merely states that "the evidence presented by the people was insufficient to justify the verdict," without pointing out in any way, nor at all, as to what the evidence was or the respects wherein it was insufficient, it is not the duty of this court to consider the sufficiency of the evidence, but it will regard it as sufficient. (*People v. Bordet*, 426.)
- 251. EVIDENCE OF WIFE—OBJECTION TO QUESTION SUSTAINED OVERCOME BY SUBSEQUENT ANSWER.**—Where the wife testified that her husband went with her first to a neighboring house, the woman in which went with them to the house of prostitution, an objection sustained to a question as to what conversation took place in the first house was overcome by subsequent answer, that she had no conversation with any person at that first house. (*Id.*)
- 252. EXAMINATION OF DEFENDANT—LEAVING CHILDREN IN CARE OF SOCIETY—STATEMENT REGARDING WIFE—PROPER EXCLUSION.**—Where, upon defendant's examination after testifying that he placed his children in care of the Society for the Prevention of Cruelty to Children, a question as to what statement he then made to them respecting his wife was properly excluded, where nothing appeared to show its materiality; and any self-serving declaration made by him at that time to third parties would not be admissible. (*Id.*)
- 253. ROBBERY—PRELIMINARY EXAMINATION—RIGHT OF ACCUSED TO COUNSEL—SUFFICIENT INSTRUCTION.**—Where defendants charged with robbery were, upon their preliminary examination, informed, as soon as the complaint was read, that each of them had the right to a preliminary examination, and the right to procure counsel, and the right to be admitted to bail pending the examination, they were sufficiently instructed as to their rights. (*People v. Crowley*, 322.)
- 254. WAIVER OF RIGHT TO COUNSEL.**—When the defendants were informed of their right to procure counsel, if they so desired, they should have asked for time in which to procure the same; and where, instead of doing so, upon their being asked when they would be ready to proceed with the examination, they answered: "We will be ready at any time," they thereby waived their right to procure counsel. (*Id.*)
- 255. STATUTORY PROVISION AS TO PROCURING COUNSEL—REQUEST BY DEFENDANT ESSENTIAL.**—The statute does not require the magis-

CRIMINAL LAW (Continued).

trate to appoint counsel at a preliminary examination, but merely provides that "upon the request of the defendant" the magistrate must "require a peace officer to take a message to any counsel in the township or city the defendant may name." (Id.)

256. EVIDENCE—CRIMINAL ATTEMPT TO ESCAPE—PREVENTION BY OFFICER.—Evidence was admissible as tending to show a criminal attempt to secure the escape of the defendants and its prevention by an officer, proving that while defendants were in the county jail when the arresting officer opened the door to let an attendant pass in with their meals, one of the defendants with a gun in his hands immediately commanded the officer to throw up his hands, that the officer closed the door as far as possible and seized the gun, and drawing his own pistol sent a shot through defendant's body, which killed the attendant. (Id.)

257. EVIDENCE—COMMISSION OF ANOTHER CRIME—RELEVANCE TO ISSUE. Though the commission of another crime than the offense charged may not be proved for the sole purpose of showing that the defendant would be more likely to have committed that charged, yet if the evidence of another crime is material and relevant to the issue, the mere fact that it tends to establish guilt of a crime other than the one alleged furnishes no ground for its rejection. (Id.)

258. ATTEMPT TO ESCAPE A PROPER SUBJECT OF PROOF.—An attempt to escape is always a circumstance proper to be shown and considered by the jury. (Id.)

259. ARREST FOR FELONY WITHOUT WARRANT NOT JUSTIFYING ATTEMPT TO ESCAPE.—Defendants charged with a felony may be arrested by a peace officer without a warrant, and the fact that the defendants charged with robbery were arrested by such an officer without a warrant and confined in the jail did not justify their attempt to escape on the morning following their arrest and confinement therein. (Id.)

260. SUFFICIENCY OF EVIDENCE OF ROBBERY.—Where two eye-witnesses testified to having seen the defendants in the act of "going through" their victim, and watched them until they came past them into the light, where they were plainly seen, and that upon finding the peace officer they pointed out the defendants, who were arrested by him, the evidence is sufficient to sustain the verdict. (Id.)

261. DISCRIMINATION IN SEVERITY OF SENTENCES.—Where one of the defendants appeared more culpable than the other and yet received no heavier punishment than he deserved, neither of the defendants can complain that the other defendant received a less sentence than he deserved. (Id.)

262. VENUE OF OFFENSE.—*Held*, that the venue of the offense was sufficiently and distinctly proved. (Id.)

CRIMINAL LAW (Continued).

263. **INSTRUCTIONS AS TO ATTEMPT TO ESCAPE.**—*Held*, that the court fairly, fully, and correctly stated the law as to the effect of an attempt to escape by a prisoner who is arrested for a felony, as a circumstance to be considered by the jury as bearing upon the consciousness of guilt of the offense charged against him. (Id.)
264. **RAPE—SEXUAL INTERCOURSE WITH YOUNG GIRL—ERROR IN ADMITTING EVIDENCE—DISTINCT RAPE BY ANOTHER PERSON.**—Upon the trial of a charge of rape by the defendant committed by sexual intercourse with a female under sixteen years of age not his wife, it was prejudicial error to admit evidence of a distinct act of rape subsequently committed by a male companion of defendant on the same day upon the prosecuting witness at a different and remote place, for the commission of which defendant was not in any way responsible. (People v. Edwards, 551.)
265. **GENERAL RULE AS TO PROOF OF OTHER OFFENSES.**—It is a general rule that the prosecution cannot prove other offenses committed even by the defendant for the purpose of increasing the likelihood that he committed the offense charged, the only exception being where another offense actually tends to show the intent with which the act charged was done; but in no case has any court justified the admission of a distinct offense by another party, except in instances where the acts and declarations of conspirators are sought to be shown, though acts and declarations even of a conspirator are not admissible after the commission of the crime. (Id.)
266. **DISTINCT AND INDEPENDENT CRIME OF THIRD PARTY—ABSENCE OF CONNECTION WITH OFFENSE CHARGED.**—It cannot be claimed that the acts and conduct of a third party, involving an independent and substantive crime, committed after the offense charged against defendant was completed, and at a remote place therefrom, have a logical or necessary connection with the offense charged against the defendant. (Id.)
267. **ACT OF THIRD PARTY NOT PART OF RES GESTAE.**—The term "*res gestae*" signifies circumstances and declarations growing out of a main fact, which are contemporaneous with it, and serve to illustrate its character. The subsequent and independent act of the male companion of defendant is not part of the *res gestae* of the defendant's crime, and is not a necessary incident of defendant's act. (Id.)
268. **MOTION TO DISMISS APPEAL—FAILURE OF ORIGINAL RECORD TO SHOW NOTICE—ADDITIONAL RECORD.**—A motion to dismiss an appeal in a criminal case cannot be granted for failure of the original record to show a notice of appeal, where an additional and supplemental record filed by leave of this court shows that such notice was actually given by the defendant in open court at the proper time. (People v. Harrison, 555.)

CRIMINAL LAW (Continued).

269. **RAPE—SEXUAL INTERCOURSE WITH YOUNG GIRL—PREJUDICE OF JUROR AGAINST CRIME CHARGED—ERROR IN OVERRULING CHALLENGE.** Where in impaneling a jury upon a charge of rape in having sexual intercourse with a girl under sixteen years of age, not his wife, a juror examined as to his qualifications declared his prejudice against the crime charged, and that he would give the benefit of the doubt to the family, it was error to refuse to sustain the defendant's challenge against such juror for actual bias. (Id.)
270. **CONSTITUTIONAL RIGHT TO IMPARTIAL JURORS.**—The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury guaranteed by the constitution. (Id.)
271. **KIND OF PREJUDICE NOT MATERIAL.**—There is no difference to be recognized in the application of the rule, where the prejudice exists against the defendant individually, or where a like prejudice exists on account of the offense with which he is charged. (Id.)
272. **CHALLENGE FOR ACTUAL BIAS—DUTY OF COURT.**—The challenge being for actual bias, the trial court was called upon to determine the facts. (Id.)
273. **DISCRETION—QUESTION OF LAW—REVIEW ON APPEAL.**—While in passing upon actual bias, a large discretion is vested in the trial court, and its ruling is only reviewed in exceptional cases, yet when the evidence of the juror upon his examination presents to this court a question of law, the disallowance of a challenge for actual bias may be reviewed upon appeal. Where there is no conflict in the evidence presented upon the trial of a challenge for cause, the matter is resolved into a question of law reviewable upon appeal. (Id.)
274. **OPINION UPON CROSS-EXAMINATION—ABILITY TO LAY ASIDE ADMITTED PREJUDICE.**—An opinion stated by the witness on cross-examination, that he could lay aside his admitted prejudice and give the defendant the benefit of a reasonable doubt, does not cause a conflict in the evidence preventing the ruling upon his admitted prejudice from being reviewed upon appeal as matter of law. (Id.)
275. **EFFECT OF DISALLOWED CHALLENGE ON PEREMPTORY CHALLENGES—DEFENDANT PREJUDICED.**—Where, owing to an error in matter of law in disallowing a challenge to a juror for cause, he was compelled to exhaust one of his peremptory challenges in getting rid of the prejudiced juror, he was thereby prejudiced by the reduction in the number of the peremptory challenges which he has the right to exercise upon his mere whim or caprice. (Id.)
276. **PREJUDICIAL ERROR WARRANTING REVERSAL.**—The error of the court in denying defendant's challenge for cause, which had the effect to deprive the defendant of his full right to exercise ten peremp-

CRIMINAL LAW (Continued).

tory challenges, is so prejudicial as to warrant a reversal of the judgment and order appealed from by the defendant. (Id.)

277. RAPE—SEXUAL INTERCOURSE WITH YOUNG GIRL—PROOF OF VENUE. On the trial of a prosecution for rape by defendant in having sexual intercourse with a female under the age of consent not his wife, it is held that, notwithstanding defendant's contention upon appeal that the venue was not proved, the proof was direct and satisfactory as to the county in which the crime was perpetrated. (People v. Smith, 627.)

278. EVIDENCE—EQUIVOCAL STATEMENT OF DEFENDANT—CONNECTION WITH OTHER EVIDENCE—QUESTION FOR JURY.—Evidence of a conversation with defendant in which he spoke of two sisters, and said he "had one of them down on the bed the other night, and had felt of her, that she first fought, and finally gave way to him, and he could have had sexual intercourse with her if he had wanted to," was admissible, though he did not mention her name. Though he might have referred to either sister, yet such testimony was for the jury, and, taken in connection with the other evidence, the jury were justified in concluding that he referred to lewd conduct with the prosecutrix. (Id.)

279. QUESTION AS TO CONDUCT WITH GIRL THIRTEEN YEARS OLD—ABSENCE OF MISCONDUCT OF DISTRICT ATTORNEY.—The district attorney was not guilty of misconduct by inquiry as to conduct of defendant with a girl thirteen years old, where the question was ruled out as not referring directly to the plaintiff, where he explained to the court that defendant made such remark without stating the name or when it occurred. It must be assumed that the district attorney acted in good faith, and believed that the evidence was relevant and referred to the prosecutrix. (Id.)

280. DISALLOWING VIEW OF PREMISES—DISCRETION OF COURT—PREMISES FULLY DESCRIBED—PHOTOGRAPHS AND DRAWINGS.—The court did not abuse its discretion in disallowing an inspection of the premises where the crime was committed, where the premises were fully described to the jury by the witness, and photographs and drawings of them were received in evidence. (Id.)

281. REQUEST AS TO CONVICTION ON UNCORROBORATED TESTIMONY OF PROSECUTRIX PROPERLY REFUSED—CORROBORATION—CAUTION.—The court did not err in disallowing an argumentative instruction requested by the defendant as to a conviction on the uncorroborated testimony of the prosecutrix, where there was some evidence of corroboration, and where the caution it required of the jury was sufficiently covered by the instructions given. (Id.)

282. REQUEST AS TO FAILURE OF PROSECUTRIX TO MAKE "PROMPT AND SEASONABLE" COMPLAINT OF CRIME—INVASION OF PROVINCE OF JURY. The court properly refused a request as to the failure of the prosecu-

CRIMINAL LAW (Continued).

- trix to make a "prompt and seasonable complaint" of the crime as involving an invasion of the province of the jury. (Id.)
283. **REQUEST AS TO "POLICY OF LAW" AS TO INNOCENT PERSONS.**—The court properly refused a requested instruction as to the "policy of the law" as to innocent persons. The court is required to state to the jury the law, and not the reasons for its enactment or the nature of the public opinion which sanctions it. (Id.)
284. **REQUEST AS TO DUTY OF EACH INDIVIDUAL JUROR.**—It was not necessary to give a request as to the duty of each individual juror to be convinced of the guilt of the defendant, as that was clearly implied in the several instructions given by the court as to the duty of the jury. (Id.)
285. **LAW COVERED BY CHARGE.**—It may be said that every needful instruction was given to the jury to enable them to consider and determine intelligently the facts bearing upon the question of the guilt or innocence of the accused. (Id.)
286. **SUPPORT OF VERDICT.**—It is held that the defendant was fairly tried, and that the evidence supports the verdict. (Id.)
287. **RAPE WITH GIRL UNDER AGE OF CONSENT—INSTRUCTIONS—CONSENT—PRIOR WANT OF CHASTITY.**—Upon a prosecution for rape by defendant in having sexual intercourse with a girl under the age of consent, the court, after stating to the jury that her consent was immaterial, further properly instructed them that it is immaterial whether the prosecutrix was of previous chaste character at the time of the alleged offense; that want of chastity of a female under the age of consent is no defense to the charge of rape upon her, and that any statement reflecting on her previous chastity is to be disregarded. (People v. Davenport, 632.)
288. **PRIOR UNCHASTE RELATIONS NOT PROVED—DECLARATION AS TO CAUSE OF "CONDITION"—IMPEACHING EVIDENCE.**—Where there was no direct evidence of prior unchaste relations between the prosecutrix and other persons, the testimony of a witness merely to an oral declaration of plaintiff that defendant was not responsible for her "condition" was in the nature of impeaching evidence, and cannot be considered as evidence of want of chastity. (Id.)
289. **RULE AS TO IMPEACHING EVIDENCE—STATEMENT NOT PROOF OF FACT.**—The rule is that impeaching evidence by a contradictory statement does not tend to establish the truth of the matter contained therein, but only tends to affect the credibility of the witness impeached thereby. (Id.)
290. **INSTRUCTION—CAUTION AS TO ORAL DECLARATIONS—MATTER OF FACT—HARMLESS COMMONPLACE.**—While an instruction that the testimony of the oral declaration of a witness or party is to be received with caution is as to a matter of fact, yet it is held to be harmless as stating mere commonplace matter within the general

CRIMINAL LAW (Continued).

knowledge of the jury, the giving of which is not ground of reversal. (Id.)

291. **INSTRUCTION AS TO PRESUMPTION OF INNOCENCE—PROOF—REASONABLE DOUBT.**—An instruction that “the defendant is presumed to be innocent until his guilt is clearly established by the evidence,” that “all presumptions of law are in favor of the innocence of persons accused of crime, and every person so accused is presumed to be innocent until the contrary is shown, and until his guilt is established by the evidence in the trial of the case, and this presumption of innocence remains with the defendant in every stage of the trial until it is overcome by the evidence,” is not objectionable as using the word “shown” instead of “proved,” nor for the omission of proof “beyond a reasonable doubt,” where the law of “reasonable doubt” is fully stated in other instructions, so that the jury could not be misled as to the measure of proof required to overcome the presumption of innocence. (Id.)
292. **EVIDENCE—CONCEALMENT OF WITNESS BY DEFENDANT—QUESTION FOR JURY.**—Where the district attorney introduced a witness who was at defendant’s house when the offense in question was committed, and learned something about it from defendant, who stated that defendant directed him not to tell anything about the story, but to say “no” to everything asked of him, and that defendant sought to have him conceal his identity, but told his father “that the witness got into trouble, and he had to keep him out of the way,” it was a question for the jury to determine whether the testimony indicated the purpose of defendant to suppress testimony against himself, or to shield the witness from trouble. (Id.)
293. **CROSS-EXAMINATION—TROUBLE WITH GIRL AT DEFENDANT’S HOUSE.** On cross-examination, defendant had the right to show that the witness had trouble with a girl at defendant’s house, and that defendant’s concealment of the witness was to shield him from that trouble. (Id.)
294. **PREJUDICIAL RE-EXAMINATION—INSTIGATION OF TROUBLE BY DEFENDANT.**—Such cross-examination did not open the way for a re-examination to go into the details of such collateral and distinct offense at defendant’s house, on the part of the district attorney, in a manner highly prejudicial to defendant, by showing that defendant instigated and encouraged such offense, and told the girl to go upstairs with the witness. Such re-examination grossly transgressed the rights of the defendant. (Id.)
295. **PROPER CROSS-EXAMINATION OF DEFENDANT—TEST OF MEMORY.**—Where defendant claims an alibi in spending the night in question on an oil barge, the district attorney, on cross-examination, had the right to test his memory by asking as to his movements on the nights previous and subsequent to the date of the offense, and to ask him if it was not on one of those nights that he was on the barge.

CRIMINAL LAW (Continued).

The prosecution may seek, on cross-examination, to bring out evidence tending directly to explain, qualify or contradict the defendant's testimony. (Id.)

296. **CROSS-EXAMINATION OF PROSECUTRIX—VISIT TO DOCTOR WITH DEFENDANT—PREJUDICIAL ERROR.**—Where, on direct examination of the prosecutrix, it was proved that she visited a doctor with the defendant, the defendant had the right to show on cross-examination that she had had intercourse with another person, not to prove that she was unchaste at the time of the alleged offense, but to resist the inference that the defendant was responsible for her condition, and defendant was entitled to the utmost latitude, on cross-examination, to rebut that inference, and it was prejudicial error to disallow such right. (Id.)
297. **MISCONDUCT OF DISTRICT ATTORNEY—PREJUDICIAL COMMENT ON COLLATERAL OFFENSE.**—It was misconduct of the district attorney to comment on defendant's instigation of the collateral offense, which was improperly admitted, and was calculated to arouse bitter resentment against defendant on the part of the jury, and to disqualify them to view dispassionately and fairly the evidence against the defendant upon the particular charge in the information. (Id.)
298. **RIGHT OF DEFENDANT TO FAIR CONVICTION.**—If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent. (Id.)
299. **SUFFICIENCY OF INFORMATION—OFFENSE CHARGED IN LANGUAGE OF STATUTE—WORDS NOT REQUIRED.**—The information for rape, in this case, conforming to the language of the statute defining it, was sufficient, and a demurrer thereto was properly overruled. It was not necessary to use the word "feloniously," nor to allege that the act was "willfully" done. When it is alleged that a person does an act, it implies willfulness. (Id.)
300. **SUPPORT OF VERDICT.**—The evidence was sufficient to support the verdict. The testimony of the prosecutrix was sufficient for that purpose, though there was additional evidence lending aid to the inference of guilt. (Id.)
301. **REVERSAL ON OTHER GROUNDS.**—On the other grounds above stated, the verdict cannot be upheld. (Id.)
302. **RAPE—SEXUAL INTERCOURSE WITH YOUNG GIRL—SUPPORT OF VERDICT.**—*Held*, that, in this prosecution for rape committed by the defendant in having sexual intercourse with a young girl under the age of sixteen years, it was for the jury to determine as to the truth of the testimony for the prosecution, in the first instance, and where the judge of the trial court, who also heard and saw the witnesses, has approved of the verdict for conviction, this court cannot say, as matter of law, that the verdict is not supported by the evidence. (People v. Boero, 686.)

CRIMINAL LAW (Continued).

- 303. EVIDENCE—PREVIOUS ACTS OF INTERCOURSE.**—Upon the trial of such prosecution, the court properly admitted evidence of other acts of sexual intercourse between the defendant and the prosecutrix, occurring before the act relied upon for a conviction. (Id.)
- 304. GENERAL RULE AS TO OTHER ACTS.**—In prosecutions for adultery, incest and rape (especially when committed by consent upon persons under the age of consent), other acts of sexual intercourse between the same persons may be proven as showing an adulterous disposition, and thus corroborating the evidence of the substantive charge. (Id.)
- 305. CONFLICT IN AUTHORITIES AS TO TIME OF OTHER ACTS.**—There is some conflict in the authorities as to the right to give evidence of acts of sexual intercourse occurring after the act upon which the indictment is based, but acts occurring prior thereto are well within the rule allowing such evidence. (Id.)
- 306. CASE QUALIFIED.**—The case of *People v. Ah Lean*, 7 Cal. App. 628, is qualified on the subject of the admissibility of prior acts of sexual intercourse. (Id.)
- 307. DEFECTIVE RECORD AS TO TIME OF IMPRISONMENT—AMENDMENT UPON NOTICE AND HEARING.**—The objection that the judgment in the record is defective in not showing the time of imprisonment has been removed upon suggestion of diminution of the record which shows that after notice and hearing the word "years" has been inserted after the figure "20" by amendment of the judgment. (Id.)
- 308. FAILURE OF JUDGMENT-ROLL TO SHOW PRESENCE OF DEFENDANT—ERROR NOT PRESUMED.**—The mere failure of the judgment-roll to show that defendant was present during the trial on a specified afternoon is immaterial where it does not show that he was not present. All intendments are in favor of the judgment; and error will not be presumed, but must be affirmatively shown by the appellant. (Id.)
- 309. DEFENSE OF ALIBI—CONFLICT OF EVIDENCE—VERDICT CONCLUSIVE.** Where the evidence as to the *alibi* relied upon by the defendant simply raised a conflict with the testimony for the prosecution, the verdict of the jury against the defendant is conclusive upon this court. (Id.)
- 310. AUTHENTICATION OF REPORTER'S TRANSCRIPT OF EVIDENCE.**—The reporter's transcript of the evidence should be sworn to by him, as required by section 1247 of the Penal Code; and before it is transmitted to this court it must be authenticated by the trial judge, as required by section 1247A of the Penal Code. (Id.)

See Dentist; Habeas Corpus; Juvenile Court.

DAMAGES. See Agency, 2-4; Assignment, 23; Deed, 2-5; Eminent Domain, 14; Negligence, 25-30; Sale, 16-18.

DEED.

- 1. CONVEYANCE OF FEE—RESERVATION—USE OF WELL WATER—RENTAL—PERSONAL COVENANT.**—Where by deed the plaintiff granted the fee of land to the defendant, without restrictions, qualifications, conditions or exceptions, and containing the words, "Reserving, however, to the parties of the first part, the right to use the water from above-mentioned property for their dwelling-house adjoining said property on the north, provided that said parties of the first part shall pay to said party of the second part the sum of fifty cents per month as rental for said water so long as said first parties continue to use the same," such reservation is not a covenant running with the land, but constitutes only a personal agreement, which could not be specifically enforced. (Peterson v. McDonald, 644.)
- 2. SUIT FOR INJUNCTION—PLEADING—CAUSE OF ACTION AND JURISDICTION NOT SHOWN.**—An injunction will not lie to prevent the breach of a contract which cannot be specifically enforced; and a complaint in an action upon the personal contract embodied in the reservation contained in the deed from plaintiff to defendant, and alleging the shutting off of the well water from plaintiff, and a threat to withhold the same permanently, and seeking a preliminary mandatory injunction requiring defendant to restore the water to the use of the plaintiff, and for a permanent injunction to restrain defendant from obstructing plaintiff's use of the water, states no cause of action for an injunction, and shows no jurisdiction to grant any equitable relief. (Id.)
- 3. RELIEF SOUGHT REQUIRING PERSONAL SERVICES.**—If a decree were framed according to the averments and prayer of the complaint, its effect would be to compel the defendant to perform personal services, which cannot be done. He would be required to keep the well in order for plaintiff's use, and to rehabilitate and repair the machinery when out of order, for that purpose, or incur the penalty of violating the injunction. (Id.)
- 4. REMEDY OF PLAINTIFF LIMITED TO DAMAGES FOR BREACH OF CONTRACT.**—The sole remedy for plaintiff for violation of the personal agreement is to recover damages for breach of the contract. (Id.)
- 5. DAMAGES NOT RECOVERABLE IN SUPERIOR COURT—DEMURRER PROPERLY SUSTAINED.**—Where the sole amount of damages stated in the complaint for the breach of the contract is in the sum of \$25.50, the superior court has no jurisdiction of a separate cause of action to recover the same; and since the court had no equitable jurisdiction of the subject matter of the action, a general demurrer to the complaint, and a special demurrer thereto for want of jurisdiction in the superior court of the subject matter of the action, were properly sustained on both grounds. (Id.)
- 6. ACTION TO SET ASIDE DEED BY AGED WIDOW—ALLEGED INCAPACITY—WANT OF CONSIDERATION OR INDEPENDENT ADVICE—TRUST RELATION—SUPPORT OF FINDINGS.**—In an action to set aside a deed

DEED (Continued)

made by an aged widow to her surviving daughter to the exclusion of children of a deceased daughter for alleged incapacity, want of consideration or independent advice, and breach of a trust relation, where the court found against all of the allegations of the complaint, and in favor of the grantee, it is apparent that if the evidence is sufficient to sustain the findings that the grantor fully understood the nature of the transaction, and that the conveyance was the effect of her untrammelled and voluntary act, the questions as to consideration and independent advice become unimportant. (*Broadbuss v. Monroe*, 464.)

7. **RIGHT OF OWNER TO DISPOSE OF PROPERTY.**—Every owner has an incontrovertible right, in the absence of fraud, to dispose of his own property according to his volition. (*Id.*)
8. **CONFLICTING EVIDENCE AS TO WANT OF CAPACITY OF GRANTOR.**—Where the evidence for the plaintiffs addressed to the alleged want of capacity of the grantor was in substantial conflict with that for the respondents, which supports the findings made that the grantor thoroughly understood the nature and consequences of her deed, the findings as made on that question cannot be disturbed by this court. (*Id.*)
9. **SUPPORT OF FINDING AS TO VOLUNTARY DEED.**—The finding is fully supported as to the voluntary character of the transfer by deed by the widow to her daughter. The testimony of the defendants and of three other witnesses who were present at the execution of the deed justifies the conclusion of the court that the grantor was free from undue or any improper influence of the grantee or any other person. (*Id.*)
10. **AFFECTION BETWEEN MOTHER AND DAUGHTER—MINISTRATION OF DAUGHTER—DECLARATION OF GRANTOR.**—The evident affection that existed between the mother and daughter, the kindly and continued ministration of the latter to the comfort and happiness of the former, and the declaration of the grantor as to her reason for making the deed that "Mary Ann was good and kind to her, and she didn't know how she could have got along without her, and she wanted her to have what property she had; she had deserved it all," all tended to rebut any unfavorable inference against the grantee. (*Id.*)
11. **REASONABLENESS OF DEED.**—Upon the abundantly supported theory of the uniform kindness of the daughter toward the mother, and in view of the fact that it had continued through many years, and that she was the only living child, the conveyance is easily explicable, and seems entirely reasonable. (*Id.*)
12. **PRESUMPTION FROM RELATION BETWEEN PARENT AND CHILD—EVIDENCE NEGATING UNDUE INFLUENCE.**—The showing made by the evidence was sufficient to overcome any possible presumption of

DEED (Continued).

undue influence growing out of any confidential relation between the parties as aged parent and child. There was no other relation between them than that of care of the child for the parent. The daughter had no power of attorney and transacted no business for the mother. (Id.)

13. **RELATION OF PARENT AND CHILD NOT INVALIDATING DEED OF PARENT.**—The mere relation of parent and child is not sufficient to invalidate a deed from the parent to the child. It is merely a circumstance, inviting careful consideration of the transaction; but before it can justify the inference of undue influence, there must be superadded imposition, fraud, importunity, or something of that nature. Cases arising between an aged parent and child can turn only upon the exercise of actual undue influence, and not upon any presumption of invalidity. A gift from a parent to a child certainly cannot be presumed invalid. (Id.)
14. **INDEPENDENT ADVICE AND CONSIDERATION—QUESTIONS FOR TRIAL COURT.**—Though the questions of independent advice and consideration are not essential to the validity of the transaction, when the deed was fully understood and voluntary, yet they are important elements to be considered by the trial court in determining the status of the property. Though the notary summoned by her was not an independent adviser in the legal sense, yet he first took her free statement of what she wished to do with the property, and when he prepared the deed accordingly, fully made her acquainted with its contents before she executed it. The evidence as to consideration, though meager, is sufficient to support the finding of the court on that question. (Id.)
15. **SERVICES RENDERED BY DAUGHTER TO PARENT—PRESUMPTION OF GRATUITY NOT CONCLUSIVE—BURDEN OF PROOF.**—Though services rendered by a child to the parent are presumed to be gratuitous, yet such presumption is not conclusive. The burden is on the party rendering the services to overcome such presumption, and the proof is sufficient to overcome it and support the finding of consideration for the deed. (Id.)
16. **DECLARATIONS OF TESTATOR SHOWING VALUE OF SERVICES.**—The declaration of the testator showing the value of the services rendered to her by her daughter, and that she deserved the whole of the property which she proposed to deed to her, would undoubtedly be admissible against her if she were alive and contesting the deed, and they were equally admissible against her representatives, and in favor of the representatives of the deceased grantee, as being the best evidence obtainable on the question of consideration. Its weight was for the trial court. (Id.)

See Boundary; Quieting Title.

DENTISTS.

1. **DENTISTRY ACT—MISDEMEANOR FOR VIOLATION IN CITY AND COUNTY OF SAN FRANCISCO — INFORMATION — JURISDICTION OF SUPERIOR COURT.**—The superior court of the city and county of San Francisco has jurisdiction of an information for a misdemeanor for violation of the dentistry act as amended in 1909 [Stats. 1909, p. 800], by practicing dentistry without a license, which is punishable by a fine not exceeding \$1,000, or by imprisonment in the county jail not more than one year. (People v. Fortch, 770.)
2. **CONSTITUTIONAL GRANT OF JURISDICTION OF MISDEMEANORS.**—The constitution gives to the superior court jurisdiction of all cases of "misdemeanor not otherwise provided for." (Id.)
3. **JURISDICTION NOT CONFERRED UPON POLICE COURT BY FREEHOLDERS' CHARTER.**—By the freeholders' charter of the city and county of San Francisco, which went into effect on the first Monday in January, 1900, the police court created and established thereunder, as a municipal affair, is vested only with jurisdiction of the violation of municipal ordinances, and over such misdemeanors as are vested in justices of the peace under the general law. But there is no general law conferring jurisdiction upon justices of the peace of misdemeanors punishable by a fine not exceeding \$1,000, or by imprisonment in the county jail not more than one year. (Id.)
4. **REPEAL OF FORMER POLICE COURT ACTS BY FREEHOLDERS' CHARTER.** Although the former police court of the city and county of San Francisco, created under the act of March 5, 1889, as amended and supplemented by the act of February 3, 1893, was vested with jurisdiction of misdemeanors such as are created by the dentistry act, yet those acts were repealed upon the adoption of the freeholders' charter by the terms of sections 6 and 8 of article XI of the constitution, and by the adoption of a police court established thereunder as a municipal affair, by the terms of section 6, and by subdivision 1 of section 8½ of article XI, adopted November 3, 1896. (Id.)
5. **ABOLITION OF OLD POLICE COURT—NEW COURT NOT IDENTICAL.**—The police court established by the charter is not the same court referred to in the acts of 1882 and 1893, but is a new court created by a different authority. When the charter court was created, the police court created by those acts went out of existence with the repeal of the acts creating it. (Id.)
6. **REPEAL OF LEGISLATION INCONSISTENT WITH FREEHOLDERS' CHARTER.**—No act of the legislature can stand which is inconsistent with a provision in a freeholders' charter in regard to the same subject matter. (Id.)
7. **VOID PROVISION FOR CONCURRENT JURISDICTION.**—The provision in the freeholders' charter of the city and county of San Francisco,

DENTISTS (Continued).

assuming to give the superior court concurrent jurisdiction with the police court of all misdemeanors, is void. (Id.)

8. **ORIGINAL JURISDICTION OF SUPERIOR COURT OVER DENTISTRY ACT.**—There being no other court vested with jurisdiction of the misdemeanor created by the dentistry act, the superior court has original jurisdiction thereof. (Id.)
9. **INSTRUCTION AS TO BURDEN OF PROOF UPON DEFENDANT.**—The court did not err in instructing the jury that the burden was upon the defendant to prove that he either had a license from the board of dental examiners of California, or that, at the time of the passage of the act regulating dentistry approved March 23, 1901, he had the lawful right to practice dentistry in the state of California. (Id.)
10. **INSTRUCTION AS TO STATUTE DEFINITION OF "PRACTICING DENTISTRY."**—The court did not err in giving to the jury the exact language used in the statute defining what is "practicing dentistry," viz.: "That any person shall be understood to be practicing dentistry who shall for a fee, salary or reward, paid directly or indirectly, either to himself or some other person, perform an operation of any kind upon the human jaws or teeth." (Id.)
11. **POWER OF LEGISLATURE TO DEFINE DENTISTRY.**—The legislature had the power to define what is meant by the terms "practicing dentistry," and thus to make clear what acts it intended to make unlawful. (Id.)

DYNAMITING DWELLING. See Criminal Law, 65-74.

EJECTMENT.

1. **PLEADING—SUFFICIENCY OF COMPLAINT.**—A complaint in ejectment which alleges ownership or possession by plaintiffs at the time of the entry of the defendants, and ownership at the time of the commencement of the action, and that defendants, on or about a day specified, unlawfully entered the premises, and still withhold the possession thereof from plaintiffs, contains all of the averments required in an action of this character. (Merryman v. Kirby, 344.)
2. **ISSUE RAISED BY ANSWER—TRIAL—WAIVER OF OBJECTION UPON APPEAL.**—Where the defendants in their answer denied that plaintiffs *now are*, or during all of the times hereinafter mentioned, or at any other time, or at all, were, or either or any of them, were, the owners of the land and premises, they tendered an issue as to the seisin of plaintiff up to the time the action was brought; and when that issue was tried and determined against the defendants, it is too late for them to raise the objection upon appeal that no such issue was tendered by the complaint. (Id.)

EJECTMENT (Continued).**3. SUFFICIENCY OF DESCRIPTION OF LAND—IDENTITY—PRESUMPTION.**

It is sufficient that the description of the land can be so identified that in the event of a recovery the officer executing the writ will know what land plaintiff is entitled to, and thus be enabled to effect the purpose of the action. Where the description is not manifestly insufficient to identify the property, so that it can be located on the ground, it must be presumed, in the absence of evidence to the contrary, that the corners referred to in the description are marked so as to be easily identified. (Id.)

4. MODES OF DESCRIPTION.—The premises may be sufficiently described by a particular name, by which they are known, by their boundaries, by number, by lot and concession, or by section and township, or as part of a section of a certain survey. (Id.)**5. EVIDENCE NOT BROUGHT UP—INTENDMENTS IN FAVOR OF JUDGMENT.—**Whatever may appear from the pleadings, where the evidence is not brought up, all intendments are in favor of the judgment; and it must be assumed that the land awarded can be located with precision. (Id.)**6. DESCRIPTION DEEMED SUFFICIENT.—**The description of the land in the complaint as "That portion of said lot No. 4 of said section 31, in township 8 N., R. 1 E., H. B. & M., commencing at the southwest corner of the southeast quarter of said section 31, and running thence north two chains to a stake, thence west to where such line would intersect the westerly line of said lot four, thence southerly along the westerly line of said lot four, to the southwest corner of said lot four; thence east to the place of beginning," must be assumed, in the absence of evidence to the contrary, to locate the corners referred to so that they can be easily identified. (Id.)**ELECTIONS.****1. ELECTION CONTEST—JURISDICTION OF SUPERIOR COURT.—**The jurisdiction of the superior court to hear and determine election contests is included within the jurisdiction conferred upon said court by section 5 of article VI of the constitution of all such special cases and proceedings as are not otherwise provided for. (Dudley v. Superior Court, 271.)**2. PREMATURE ORDER AND CITATION—KNOWLEDGE OF PROCEEDING.—**An order for a citation made on the date of the filing of the contest is unauthorized and may be disregarded, except in so far as it is record evidence of knowledge of the proceeding, and a citation issued thereon can have no legal effect. (Id.)**3. NOTICE BY CLERK TO COURT OF FILING CONTEST—PURPOSE.—**The provision of the statute requiring the clerk to notify the court of the filing of the contest is a means provided for calling the pend-

ELECTIONS (Continued).

ency of the contest to the attention of the court, in order that the court may make a timely order calling a special session for the hearing of such action. (Id.)

4. **NOTICE NOT REQUIRED TO BE WRITTEN.**—The statute does not require that the clerk's notification to the court of the filing of the contest, must of necessity be in writing. (Id.)
5. **COURT'S KNOWLEDGE—NOTICE NOT REQUIRED.**—It affirmatively appearing that the court had actual notice of the filing of the contest on the day of its date, it was not necessary for the clerk to give a formal notification in order that the court might be apprised of the pendency of the proceeding. The prior knowledge was still in the breast of the court on the day when it made its order calling a special session to hear the contest. (Id.)
6. **CONSTRUCTION OF STATUTE—TIME FOR ORDER AFTER NOTIFICATION —WORD "THEREUPON"—REASONABLE TIME.**—The statute directing that the court, after notification by the clerk, "shall thereupon order a special session," does not by the use of the word "thereupon" import "immediately," but only "within a reasonable time." (Id.)
7. **LAPSE OF SIX DAYS AFTER EXPIRATION OF THIRTY DAYS FROM STATEMENT NOT UNREASONABLE — JURISDICTION OF SUBJECT MATTER.**—The lapse of six days after the expiration of thirty days from the filing of the contesting statement was not unreasonable, and did not deprive the court of jurisdiction of the subject matter, under the general law, to make the order fixing the date for the commencement of the session for hearing the contest, where it appears that such date was within twenty days from the time when the court was first authorized to act, and exceeded ten days, the minimum of time designated in the statute. (Id.)
8. **JURISDICTION OF PERSON OF CONTESTEE—DEMURRER TO STATEMENT —GENERAL APPEARANCE—DEFECTS IN CITATION WAIVED.**—Where the contestee upon the date when the order was made calling the special session, appeared and interposed a general demurrer to the statement of the contestant, such demurrer had the effect of a general appearance, giving the court full jurisdiction over the person of the contestee; and had the effect to waive all neglect of the clerk to issue the citation in proper form or the service thereof, which became immaterial upon the question of personal jurisdiction. (Id.)
9. **CONTEST FOR OFFICE OF MAYOR—MUNICIPAL AFFAIRS—ELECTION UNDER FREEHOLDERS' CHARTER — GENERAL LAWS APPLICABLE.**—Although the election of a mayor under a freeholders' charter is a municipal affair, and if a contest were provided thereunder it would be a municipal affair, yet such charters are subject to general laws not in conflict therewith, and in the absence of a charter

ELECTIONS (Continued).

provision for such contest, the general laws of the state are applicable thereto. (Id.)

10. **JURISDICTION OF CONTEST—PROHIBITION NOT ALLOWED.**—It appearing that the superior court had jurisdiction both of the subject matter of the contest and of the person of the parties before it, a writ of prohibition cannot be allowed regardless of any question as to the adequacy of the remedy by appeal. (Id.)

EMBEZZLEMENT. See Criminal Law, 75-106.

EMINENT DOMAIN.

1. **CONDEMNING RIGHT OF WAY FOR ELECTRIC POWER LINE—PUBLIC USE—SUFFICIENCY OF COMPLAINT.**—A complaint in an action to condemn a right of way over defendant's land for an electric power line, which states the name of the corporation in charge of the alleged public use, and that it was organized to furnish electric power, light and heat to counties, cities, towns and villages, and the inhabitants thereof, and to acquire by right of eminent domain, rights of way over lands for the transmission of electric energy and power, and that plaintiff seeks to condemn the alleged right of way for a public use, to wit, the transmission of electric energy and power for public sale, and that plaintiff is in charge of said public use, and of said alleged rights, is sufficient as against a general demurrer. (Tuolumne Water Power Co. v. Frederick, 498.)
2. **MEAGER COMPLAINT AS TO FACTS SHOWING "PUBLIC USE"—ABSENCE OF SPECIAL DEMURRER THERE TO.**—Although the complaint is not a model in its meager statement of facts showing that the use is a "public use," yet it is sufficient in the absence of a special demurrer on that ground. (Id.)
3. **INTENTION OF PLEADER—SALE TO "PUBLIC GENERALLY."**—Constructing the allegations of the complaint together, it is evident that the pleader, though alleging its purpose to condemn the right of way for the transmission of electric energy and power "for public sale," intended to allege its purpose to condemn the same for the transmission of electric energy and power for "sale to the public generally." (Id.)
4. **MEANING OF "PUBLIC USE"—JUDICIAL QUESTION—LEGISLATIVE DECLARATION.**—The term "public use" is of indefinite signification. While what is a public use is a judicial question, yet, in a doubtful case, the legislative declaration is of great persuasive force. (Id.)
5. **DECLARATION IN STATUTE AS TO "PUBLIC USES"—"ELECTRIC POWER LINES"—RIGHT OF WAY FOR "PUBLIC USES."**—The statute authorizes the right of eminent domain in behalf of certain public "uses," among which are included "electric power lines." To con-

EMINENT DOMAIN (Continued).

demn a right of way for an electric power line, for the transmission of electricity to be sold to the public, to furnish power, light and heat to counties, cities, towns and villages, and the inhabitants thereof, is clearly for "public uses," within the declaration of the statute. (Id.)

6. **CONTRACTUAL OBLIGATION NOT PREREQUISITE TO CONDEMNATION—SPECIAL DEMURRER.**—A special demurrer to the complaint, on the ground that it does not appear therefrom that the plaintiff is under any contract to furnish electricity to any person, or that it has a franchise to furnish electricity to any counties, cities or villages through which its proposed line is to run, is not tenable. It is not necessary that the plaintiff seeking to condemn a right of way should have made a contract to furnish electric power before it had installed its plant and procured the right of way for its line. (Id.)
7. **EXISTING FRANCHISE NOT REQUIRED.**—To prevent the plaintiff from exercising the right of eminent domain until it shall have obtained a franchise from some city or village, or made a contract to furnish its product to some city or village, would be to deprive it of the means by which it would be enabled to construct its works and be put in a position to make said contract. (Id.)
8. **NARROW CONSTRUCTION OF "PUBLIC USE" FOR ELECTRIC POWER IMPROPER.**—In view of the present use of electric power for numerous public purposes, which has become so general that it is almost a necessity of our modern civilization, and considering the great enterprises of the west, the courts should not give a narrow and restricted construction of the words "public use" as used by the legislature, or in the constitution. (Id.)
9. **AMOUNT OF DAMAGES TO DEFENDANT—CONCLUSIVE VERDICT.**—Where the jury were fairly and fully instructed as to the various matters to be considered in arriving at the amount of damages to defendant, their verdict upon the evidence as to such amount is conclusive. (Id.)
10. **EVIDENCE—TESTIMONY OF PLAINTIFF'S SURVEYOR—COURSE OF ELECTRIC LINE—IMMATERIAL CROSS-EXAMINATION—COUNTY ROADS.**—Where plaintiff's surveyor and civil engineer testified in chief as to where the electric line commenced and its general course, and on cross-examination stated that after it reached Alameda county it runs on a private line, except over county roads, a further question, "How many county roads does it cross over?" was properly excluded as immaterial. (Id.)
11. **SCOPE OF CROSS-EXAMINATION—DISCRETION OF COURT—MATERIALITY AND PREJUDICIAL ERROR MUST APPEAR.**—The cross-examination of a witness and the extent to which it may be carried rests largely in the discretion of the trial court. In order to predicate

EMINENT DOMAIN (Continued).

error on its refusal to allow "a question thereon, it must appear not only that the evidence sought was relevant and material, but also that the materiality is so evident that injury will be presumed from its exclusion." (Id.)

12. **INSTRUCTION AS TO LOCATION OF ELECTRIC LINE—BURDEN OF PROOF.**—The court properly instructed the jury to the effect that the plaintiff, under the law, has the right to construct its line in the manner and place it deems best, provided that the location is made in a manner most compatible with the greatest public good and the least possible private injury; and that in case it is claimed that the plaintiff has not so located its line, the proof to the contrary must be clear and convincing. (Id.)
13. **PRESUMPTION OF CORRECT ACTS BY CONDEMNING PLAINTIFF—BURDEN UPON OWNERS.**—In the absence of evidence to the contrary, the acts of the plaintiff in exercising a public function in surveying its line, and locating the land to be condemned, must be presumed to be correct and lawful, and to be the best choice for the public; and if this occasions peculiar and unnecessary damage to the owners of the property, the proof thereof must come from them, and ought to be clear and convincing, since otherwise no location could be effected. (Id.)
14. **INSTRUCTION AS TO BURDEN OF PROOF OF VALUE OF LAND TAKEN—NOMINAL DAMAGE—VERDICT FOR SUBSTANTIAL DAMAGES.**—An instruction that the burden of proof as to the value of the lands of defendant was upon the defendant, and that unless he has shown by sufficient proof that he will be damaged by the erection of the towers and transmission line thereupon, as claimed in the complaint, "then he is entitled only to a nominal damage at your hands," was correct as to the burden of proof, and did not tell the jury that the plaintiff was entitled only to nominal damage. The instructions as to damages were full and complete; and where the jury by their verdict gave only substantial damages, they evidently were not misled as to nominal damage. (Id.)
15. **RIGHT OF WAY FOR PUBLIC ROAD—PETITION FOR OPENING—BOND TO SUPERVISORS NOT ASSAILABLE COLLATERALLY.**—In a proceeding in eminent domain by a county to condemn a right of way for a public road, the bond given to the supervisors in connection with the petition to them for the opening of the road cannot be collaterally assailed for any defect therein. (County of Santa Barbara v. Yates, 44.)
16. **SUFFICIENCY OF PRELIMINARY STEPS—JURISDICTION OF SUPERVISORS.** While the law requires preliminary steps to be taken before the board of supervisors prior to maintaining an action by the county to condemn property of nonconsenting land owners, jurisdiction to

EMINENT DOMAIN (Continued).

determine the sufficiency of such steps, or whether they have been properly taken, is vested solely in the board of supervisors. (Id.)

17. **FINAL JUDGMENT OF BOARD—ORDER TO COMMENCE ACTION TO CONDEMN.**—The determination by the board as to the sufficiency of preliminary steps must be deemed the final judgment of a competent tribunal in a proceeding entirely distinct from the action to condemn. The order directing the district attorney to institute the action to condemn is in the nature of a final judgment adjudicating upon the sufficiency of all prior proceedings requisite to the making of the order. (Id.)
18. **REVIEW LIMITED TO CERTIORARI.**—If the proceedings be irregular, or any essential step therein be wanting, objection thereto should be taken by obtaining a review upon *certiorari* of such proceedings in the proper court. (Id.)
19. **INFORMALITY NOT VITIATING SUIT TO CONDEMN—CONCLUSIVE PROOF.** Under section 2690 of the Political Code, "no informality in the proceedings of the board shall vitiate said suit [to condemn], but the order of the board directing the district attorney to bring suit shall be conclusive proof of the regularity thereof." (Id.)
20. **IMMATERIAL ADDITION TO BOND—SURPLUSAGE.**—An additional insertion in the bond for the opening of the road, which is otherwise regular in form, to the statutory words "will pay all costs of viewing and surveying in case the prayer of the petition shall not be granted," of the words "and the said road finally not opened," is of mere surplusage, and does not add nor detract from the liability of the bondsmen. The bond could have reference to no road other than that indicated by the petition with which the bond was filed. (Id.)
21. **IRREGULARITY NOT AFFECTING PRIVATE RIGHTS.**—The alleged defect in the addition to the bond is at most a mere irregularity, which did not affect the private rights of the appellant whose property was condemned for a right of way for the road. (Id.)
22. **ELECTRIC LIGHT AND POWER COMPANIES—NECESSITY FOR TAKING—FUTURE NEEDS OF PUBLIC.**—Electric light and power companies, like other public service corporations, have a right, and it is their duty in determining the necessity to condemn the property sought in eminent domain, to anticipate future needs of the public. They cannot reasonably be required to limit their preparations for future demands by their ability to provide for them out of the present supply. New uses for electricity are constantly being discovered and applied. The supply which in the same community would at present be sufficient might be insufficient in a short time. (Northern Light and Power Co. v. Stacher, 404.)
23. **PLEADING—EXTENT OF FACILITIES OF PRESENT EQUIPMENT NOT REQUIRED.**—Public service corporations cannot state with certainty to

EMINENT DOMAIN (Continued).

what extent their facilities to serve the public will be availed of; nor should they be required to determine in advance and set forth in their complaint that their present equipment is insufficient to meet the needs of the people. (Id.)

24. **EVIDENTIARY MATTER.**—The requirement that the particular property sought should be available, and that it can be used for the purposes desired, and that it is necessary to meet the public needs, are matters, the particular facts in support of which are evidentiary, rather than subjects of pleading. (Id.)
25. **SUFFICIENCY OF COMPLAINT AS TO NECESSITY.**—A complaint alleging in substance that a large number of people are without electricity, whose needs in that regard the plaintiff alleges its desire and purpose to supply, and seeking to condemn necessary water power for such use, is sufficient to show the necessity for the taking. (Id.)
26. **BURDEN OF PROOF—BURDEN OF PLEADING NOT COMMENSURATE.**—The burden of proving the issue of necessity is upon the plaintiff. The evidence upon which he relies in making such proof may or may not be sufficient when subjected to the proper test at the trial. But no burden rests upon him to state all the facts he intends to prove in order that the complaint may stand the test of a demurrer. No evidentiary matter should be stated in the complaint. (Id.)
27. **POWER OF ELECTRIC LIGHT AND HEAT COMPANIES TO CONDEMN WATER POWER—CONSTRUCTION OF CODE.**—When the right of eminent domain is expressly conferred by section 1238 of the Code of Civil Procedure in behalf of canals, reservoirs, etc., “from sources other than a natural lake,” for “supplying, storing and discharging water for or in connection with the operation of machinery, for the purpose of generating and transmitting electricity,” and section 1240, properly construed, includes riparian rights to water as the subject of condemnation, it appears that water is as essential to the use of canals or reservoirs as is land, and reading sections 1238 and 1240 together, “water may be taken by the right of eminent domain in behalf of canals and reservoirs, in connection with the operation of machinery for the purpose of generating and transmitting electricity.” (Id.)
28. **WATER PART OF REAL PROPERTY TO BE CONDEMNED.**—Where land is condemned for a reservoir, if there is a water right which is part of the land, it may be condemned with it. Water flowing over land is real property and may be condemned for any public use specified in section 1238 of the Code of Civil Procedure. (Id.)
29. **RIPARIAN RIGHTS—CONDEMNATION FOR ELECTRIC POWER.**—Riparian rights in a stream of water may be condemned for public use for electric power by electric light and power companies. (Id.)

EMINENT DOMAIN (Continued).

- 30. SUFFICIENCY OF COMPLAINT—CERTAINTY OF RIGHTS TO BE CONDEMNED.**—Where the complaint definitely describes the land of all of the defendants by legal subdivisions, and alleges that “the waters of Old Cow creek flow over, along and upon said land,” and that “it is necessary that plaintiff shall appropriate, take and use all riparian rights of defendant to and connected with the waters of said Old Cow creek,” and it prays for the condemnation of the riparian rights therein, it shows with reasonable certainty the property sought to be condemned. (Id.)
- 31. FACTS SHOWING NECESSITY NOT REQUIRED TO BE PLEADED.**—Facts showing the necessity for the taking of such rights for public use are not required to be pleaded, but are matter of evidence. (Id.)
- 32. QUANTITY APPROPRIATED BY PLAINTIFF IMMATERIAL—QUANTITY OF RIPARIAN RIGHTS NEED NOT BE STATED.**—Where the complaint sets forth that plaintiff is the owner and appropriator of five thousand inches of the waters of the stream, that fact is immaterial, where the only property sought to be condemned is the riparian rights of the defendants. The quantity of such riparian rights need not be stated; but it is sufficient that the complaint avers the necessity for taking all of the water of the creek, including the riparian rights of the defendants, which is the only matter in issue. (Id.)
- 33. COMPENSATION TO BE FIXED.**—Whatever may be the riparian rights of the defendants, which plaintiff seeks to condemn, it will be for the court or the jury to fix the compensation to be paid to each owner, as the facts proved may warrant. (Id.)
- 34. PLEADING—PUBLIC USE.**—A complaint showing that plaintiff is an electric power and light company, and that it needs the riparian rights of the defendants, sufficiently shows that the use sought is a public use, and that the plaintiff is in charge of a public use. (Id.)
- 35. PUBLIC USE MUST BE DECLARED BY LAW.**—The complaint must show that the use for which the property is to be taken is for a public use, so declared by the legislature. No property can be condemned for a private use, or to accomplish any purpose not of a public character. (Id.)
- 36. RIPARIAN RIGHTS NOT EXPRESSLY ENUMERATED—NECESSARY IMPLICATION—AUTHORITATIVE CONSTRUCTION.**—The mere fact that riparian rights are not expressly enumerated as the subject of condemnation is not conclusive, where their condemnation is necessarily implied in the language of subdivisions 12 and 13 of section 1238 of the Code of Civil Procedure, construed with section 1240 thereof, which includes “all real property” and “all classes of private property not enumerated,” with no express exception of riparian rights; and where it is settled by authoritative construction that riparian rights are the proper subject of condemnation to public use. (Id.)

EMINENT DOMAIN (Continued).

- 37. COMPLAINT SHOWING CAUSE OF ACTION—DEMURRER IMPROPERLY SUSTAINED — REVERSAL.**—Where the complaint stated a sufficient cause of action for the condemnation of riparian rights for the public use of an electric light and power company, a demurrer thereto was improperly sustained and the judgment sustaining it must be reversed, with direction to overrule the demurrer. (Id.)

See Remainders, 1-24.

ESCAPE. See Criminal Law, 107-111.

ESTATES OF DECEASED PERSONS.

- 1. CLAIM ALLOWED AND SETTLED — LAPSE OF TIME—MOTION TO VACATE — WANT OF JURISDICTION — PROHIBITION.**—The superior court has no jurisdiction to vacate a claim allowed and settled, which has become final by the lapse of time, and prohibition will lie to prevent the vacation thereof on motion of the administrator of the estate. (Kowalsky v. Superior Court, 218.)
- 2. APPEAL NOT ALLOWED FROM VACATING ORDER—ABSENCE OF LEGAL REMEDY.**—No appeal is allowed from an order vacating an allowed claim against the estate; and no other provision appears giving any legal remedy against such order. (Id.)
- 3. CLAIM PASSED INTO SETTLEMENT OF ACCOUNT—CONCLUSIVENESS.**—When, by the allowance of claims in a former settled account presented by the administrator, the claim involved has passed into the category of claims "passed upon in the settlement of a former account" as provided in the Code of Civil Procedure, it is thereby conclusively established against all persons interested in the estate, in the absence of an appeal therefrom, or of any relief obtained therefrom under section 473 of the Code of Civil Procedure. (Id.)
- 4. SEPARATE LIST OF CLAIMS NOT REQUIRED—"EXHIBIT" IN ACCOUNT.** The provision of section 1268 of the Code of Civil Procedure that every account must exhibit all debts which have been presented and allowed during the period embraced in the account does not require that a separate list be made of the claims allowed. The setting forth of the particulars of each claim and of the manner of its presentation is a sufficient "exhibit" of the debts presented and allowed in the account. (Id.)
- 5. MATURITY OF NOTE AFTER DEATH.**—The fact that the note allowed and settled as a claim against the estate matured after the death of the deceased is no objection to the conclusiveness of its settlement as an allowed claim in the administrator's account, when that account became absolutely final. (Id.)
- 6. FAMILY ALLOWANCE—ORDER OF DISCONTINUANCE NOT APPEALABLE —CONSTRUCTION OF CODE.**—Under subdivision 3 of section 963 of the Code of Civil Procedure, an appeal is only allowed from an

ESTATES OF DECEASED PERSONS (Continued).

original order granting or refusing to grant a family allowance, and an order discontinuing a family allowance granted "until further order of the court" upon the petition of the heirs and devisees under the will of the deceased is not appealable. (Estate of Overton, 117.)

7. **OBJECTION TO JURISDICTION OF COURT—CERTIORARI—APPEAL.**—If the court was without jurisdiction to make the order appealed from, as objected by appellant, its power could only be tested by *certiorari*, and not by appeal. (Id.)
8. **MOTION TO DISMISS APPEAL—WANT OF AUTHORITY TO MAKE ORDER IMMATERIAL.**—It is not a sufficient answer to a motion to dismiss the appeal from the nonappealable order that the lower court had no authority to make the order appealed from. The right of appeal comes from the statute, and not from any unauthorized action of the court. (Id.)
9. **RETENTION OF POWER TO MAKE ORDER—"FURTHER ORDER OF COURT"—DUTY OF COURT.**—The court retained its power over the order granting the family allowance, by inserting the provision, "until the further order of the court." Upon a proper showing, it became its duty, and it was within its power, to reduce or discontinue the allowance. (Id.)
10. **PARTIAL DISTRIBUTION UNDER WILL—APPEAL—PRESUMPTIONS—RECITAL—AFFIRMANCE.**—Where an appeal is taken from a decree of partial distribution under the will of a deceased person on the judgment-roll, without a bill of exceptions, all presumptions upon appeal are in favor of the regularity of the judgment and decree of the trial court; and where the decree recites that no one appeared or opposed the application, and that the petitioner is the sole devisee under the will of the deceased, and that deceased left no legal heirs, the judgment must be affirmed. (Estate of Kearney, 92.)
11. **SERVICE OF PETITION ON EXECUTOR—RECITAL OF APPEARANCE—PRESUMPTION.**—Though the record does not show formal service of the petition of partial distribution under the will on the executor, yet the recital in the decree appealed from that the executor appeared by attorney at the hearing is sufficient proof of the notice of the application to the executor. It must be presumed that it was personally served; but whether it was or not, the appearance by attorney is conclusive that the executor received notice. (Id.)
12. **COUNTER-PETITION ON FILE AT TIME OF HEARING—CLAIM BY APPELLANT AS ASSIGNEE OF ALLEGED HEIR—NOTICE NOT SHOWN.**—The mere fact that at the time of the hearing of the petition for partial distribution under the will, there was on file a counter-petition of appellant claiming as assignee of an alleged sole heir

ESTATES OF DECEASED PERSONS (Continued).

for partial distribution cannot preclude the affirmance of the decree of partial distribution to the devisee, where there is nothing in the record to show that any notice thereof was served upon the executor or devisee prior to the hearing and decree appealed from, or that they had any knowledge thereof. (Id.)

13. **COUNTER-PETITION NOT JUDICIALLY NOTICED—ABSENCE OF DUTY OF COURT.**—It was not the duty of the court either to take judicial notice of the fact that the counter-petition of appellant was on file at the time of the hearing of the petition for partial distribution under the will, or to continue the hearing of such petition, so that both petitions could be heard at the same time; nor was it the duty of the court to act as attorney for either party. (Id.)
14. **NOTICE TO APPELLANT OF PETITION OF DEVISEE—FAILURE TO APPEAR OR TO OPPOSE.**—The appellant having had legal notice of the hearing of the former petition of the devisee for partial distribution, and having failed to appear or oppose the same, his appeal from the decree in favor of the devisee, to which he was no party, is fruitless, and the decree must be affirmed. (Id.)
15. **DISTRIBUTION—EVIDENCE—DECLARATIONS OF DECEASED BROTHER OF INTESTATE—RELATIONSHIP—INDEPENDENT PROOF NOT REQUIRED.**—Whatever may be the rule in other jurisdictions, the rule is settled in this state that evidence of the declarations of a deceased brother of an intestate sister, as to the relationship between them are admissible in favor of his daughter as petitioner for distribution of the estate of the deceased sister, without requiring any independent proof as to the relationship between the deceased brother and sister. (Estate of Clark, 786.)
16. **PROOF OF PATERNITY OF CLAIMANT—ADMITTED FACT—DECLARATIONS OF MEMBER OF FAMILY.**—The only proof of relationship required is that of the paternity of the declaring brother to the claimant of the estate of the deceased sister; and that fact being admitted, the declarations of the deceased brother are not those of a stranger, but of a member of the family. (Id.)
17. **APPEAL—PROOF OF RELATIONSHIP—SUFFICIENCY TO SUPPORT FINDINGS.**—It is held, upon appeal by the state from the decree of distribution, upon which the findings were assailed, that the proof fully sustains them, that it is sufficient to identify Eliza Clark, the intestate, as the same one who was sister of the father of the petitioner for distribution, and that the relationship was fully established by the direct testimony of witnesses as well as by evidence of the declarations of members of the deceased brother's family, and also by evidence of the admissions and declarations of Eliza Clark herself, constituting an acknowledgment on her part as to the relationship. (Id.)

See Appeal, 7; Willa.

ESTOPPEL. See Agency, 5; Assignment, 6.

EVIDENCE.

1. **PROOF OF CONTENTS OF DESTROYED BOOK—ADMISSION OF COPY—UNTENABLE OBJECTION—ABSENCE OF PREJUDICE.**—Although a book which is not one of original entry is inadmissible, yet where a book of original entry has been destroyed by fire, the contents thereof may be proved by any witness having knowledge of its contents, and where the bookkeeper testified that the books were correctly kept, and that a purported copy thereof was correct, the admission in evidence of such over an untenable objection cannot require a reversal, especially where the admission is without prejudice, since the court did not base its findings or judgment thereupon, but based them upon other evidence. Any error not affecting the substantial rights of the parties must be disregarded, under section 475 of the Code of Civil Procedure. (*Stone v. San Francisco Brick Co.*, 203.)
2. **REFRESHING MEMORY OF WITNESS—USE OF MEMORANDUM.**—A witness is entitled to refresh his memory by the use of a memorandum made at the dictation and under the direction of the witness, when the facts were fresh in his memory, and he knew that the facts were correctly stated therein. (*Id.*)

See Appeal, 6, 16, 23; Attorney at Law; Assignment, 19, 20, 32; Attachment, 3, 4; Contract, 1, 2, 21, 23-28, 32, 40, 43-49; Corporation, 7, 13, 15, 35; Criminal Law, 8, 9, 35, 40-49, 65, 69-74, 89, 92, 127, 128, 139, 140, 146, 147, 167, 170, 176, 177, 181-185, 187-193, 196-202, 206, 218-220, 223-230, 242, 251, 256-260, 264-267, 277-280, 288-296, 302-310; Deed, 16; Eminent Domain, 10, 11; Estates of Deceased Persons, 15-17; Mechanics' Liens, 14-21; Negligence, 13-15, 25; Sale, 19-23.

EXECUTION. See Appeal, 8.

FALSE PRETENSES. See Criminal Law, 112-141.

FINDINGS.

1. **ASSUMPSIT—WORK, LABOR AND MATERIALS—PLEADING—STATUTE OF LIMITATIONS—INADVERTENT FINDING—CLERICAL ERROR.**—Under a complaint in *assumpsit* for the reasonable value of work and labor done and materials furnished to plaintiff's assignor, at defendant's request, "within two years last past," a finding made one year later, sustaining the averments of the complaint, but following its language "within two years last past," evidently used those words inadvertently. The form of such finding is not to be commended, and should be avoided; but where the vital questions of fact presented by the pleadings are answered by the findings, and the substance of the finding complained of is supported by the evi-

FINDINGS (Continued).

dence, the judgment should not be reversed or a new trial granted for what so clearly appears to be a mere clerical error. (*Stone v. San Francisco Brick Co.*, 203.)

- 2 FINDINGS CONSIDERED AS A WHOLE—CAUSE OF ACTION SUSTAINED—IMMATERIAL FINDING DISREGARDED.**—The findings must be read together as a whole, and where the court found that prior to the commencement of the action the claim stated in the complaint was assigned to the plaintiff, and also found in response to a plea of the two years' statute of limitations that the cause of action was not barred by limitation, and found the value of the work and labor done and materials furnished, and the nonpayment of the debt, such findings substantially showed that the debt accrued within two years before the commencement of the action; and, under these circumstances, the finding containing the words "within two years last past," is immaterial, and should be disregarded. (*Id.*)

See Contract, 1.

FORGERY. See Criminal Law, 142-151, 168.

FRAUD. See Corporation, 1-7.

GAS COMPANY.

- 1. ACTION FOR PENALTY FOR REFUSAL TO SUPPLY GAS—USE OF WORDS OF STATUTE—GAS FOR LIGHTING PURPOSES IMPLIED.**—In an action to recover the statutory penalty for illegal and persistent refusal to supply plaintiff's residence with gas from its mains, after written demand therefor, where the statute does not specify gas for lighting purposes, which is implied in its use in a residence, it is sufficient that the language of the statute is followed in the complaint to recover the penalty for persistent refusal to comply with plaintiff's written demand for gas for the building occupied by plaintiff. (*Fair v. Home Gas etc. Co.*, 589.)
- 2. ACTION UPON STATUTE—CORRECT RULE OF PLEADING—CONSTRUCTION OF STATUTE AND PLEADING IDENTICAL.**—Conceding that the language used in the body of the statute when it refers to "gas" is to be construed to mean "gas for lighting purposes," it is a correct rule of pleading, in declaring upon a statute, to describe the cause of action in the words of the statute. This is allowed even in criminal cases. The court cannot put one construction upon words used in a statute, and deny the same construction when the same words are used in a pleading. The statute and the complaint must have the same construction, and the word "gas," when used in either, must have the same meaning and application. (*Id.*)
- 3. LOCATION OF HOUSE IN RELATION TO DEFENDANT'S MAINS—CONSTRUCTION OF COMPLAINT—AIDED BY ANSWER.**—Where the com-

GAS COMPANY (Continued).

plaint alleged that between certain dates plaintiff was the occupant of a building and premises which are and were through said period distant not more than one hundred feet from defendant's mains, and that from the first date until the present time plaintiff has resided upon said building and premises, is to be fairly construed as averring that the house and premises were at the date of filing the complaint located at the same distance from defendant's mains, in the absence of a special demurrer, and especially when the answer aided the complaint by expressly admitting that during all of the times mentioned in the complaint service pipes belonging to defendant, connected with said gas mains at plaintiff's said premises, have been and still are located on said premises. (Id.)

4. **SUFFICIENCY OF COMPLAINT TO SUPPORT JUDGMENT.**—*Held*, that a general demurrer to the complaint was properly overruled, and that its allegations are a sufficient basis for the support of the judgment rendered upon the statutory penalty, which was correctly computed. (Id.)
5. **SUFFICIENT DEMAND ADMITTED.**—Where the demand averred was sufficient plainly to inform defendant that it was required to perform the duty to which the demand referred, it was admitted by failure to deny it in the answer. (Id.)
6. **UNWARRANTABLE CLAIM IN ANSWER—DEPOSIT REQUIRED.**—It affirmatively appears by the answer that the refusal to furnish gas was not based upon the insufficiency or uncertainty of the demand, but the reason therefor was plaintiff's refusal to comply with an arbitrary and unwarranted claim for ten dollars' deposit, which defendant sought to exact, and which it had no right to do. (Id.)

GRANTOR AND GRANTEE. See Deed.

GUARDIAN AND WARD. See Parent and Child; Remainder, 20.

HABEAS CORPUS.

1. **CONVICTION IN JUSTICE'S COURT—APPEAL TO SUPERIOR COURT—DISMISSAL.**—Where a petition for a writ of *habeas corpus* shows a conviction in the justice's court for violation of the act of March 6, 1909 (Stats. 1909, p. 140), prohibiting the mooring and anchoring of house boats in rivers and streams of the state in certain limits, and avers that upon appeal to the superior court the justice's judgment was affirmed, and that the validity of the act was passed upon in the superior court, but shows no application for the writ to the superior court, as required under Rule XXVI of this court, and further shows that the appeal was dismissed by the superior court for want of jurisdiction, without a trial upon the merits, the writ must be denied. (Matter of Mulholland, 734.)

HABEAS CORPUS (Continued).

2. **APPLICATION BASED ON NONEXISTENT FACT.**—Where the only fact stated in the petition on which the writ of *habeas corpus* was originally asked for in this court is that the validity of the act was fully heard and determined in the superior court, but the order made by the superior court shows this not to be the fact, there is no basis for the petition for the writ to this court. (Id.)
3. **DISAGREEMENT OF COURT—DENIAL OF WRIT.**—Where the appellate court, upon an application for a writ of *habeas corpus*, is unable to concur in a judgment, either for remanding the prisoner or discharging him, the writ must be regarded as denied, under section 4 of article VI of the constitution, as well as upon the authority of *Ex parte Oates*, 3 Cal. App. xiii, and *Ex parte Sauer*, 3 Cal. App. 237. (Matter of Osborne, 735.)
4. **REMAND OF PRISONER TO CUSTODY—ORDER FOR BAIL DISCHARGED.**—Upon the return of the prisoner to the custody of the sheriff, or upon his resumption of such custody, the order for bail pending the proceedings must be discharged, and if money was deposited in lieu of bail, it will be ordered to be returned to him by the clerk. (Id.)

See Criminal Law, 24, 30, 111.

HIGHWAY. See Streets, Roads and Highways.

HUSBAND AND WIFE. See Community Property.

INCEST. See Criminal Law, 169-174.

INDEMNITY. See Assignment, 24.

INFANTS. See Parent and Child.

INJUNCTION. See Deed, 2-5; Partnership, 7; Water and Water Rights, 1.

INSTRUCTION. See Criminal Law, 36, 53-56, 62-64, 79, 97-100, 104, 105, 119-125, 141, 148-151, 154, 155, 161, 173, 178-180, 186, 194, 195, 208-211, 215-222, 233-240, 244-249, 281-285, 287, 290, 291; Dentists, 9, 10; Eminent Domain, 12-14; Negligence, 3-6, 17, 31-34; New Trial, 11, 12.

INTEREST. See Appeal, 18; Promissory Note, 5; Sale, 24.

JOINT TENANCY. See Community Property, 6, 7.

JUDGMENT. See Appeal, 14-18, 21; Assignment, 4, 5; Corporation, 17-21; Mechanics' Liens, 1, 2.

JURISDICTION. See Appeal, 17; Corporation, 18; Costs, 1; Criminal Law, 3-5, 30-33; Dentists, 1-8; Election, 1, 7, 10; Juvenile Court; Mechanics' Liens, 1, 2; Municipal Corporations, 12, 13; Specific Performance, 3.

JURY AND JURORS. See Criminal Law, 81-91, 241, 269-276.

JUSTICE'S COURT.

1. **WRIT OF REVIEW—JURISDICTION OF SUPERIOR COURT TO DISMISS APPEAL FROM JUSTICE'S COURT—ERRONEOUS ACTION.**—A writ of review will not lie to annul the action of the superior court in dismissing an appeal from the justice's court taken thereto on questions of law and fact, however erroneous and arbitrary the action may be, since the superior court has jurisdiction as fully to hear and determine a motion to dismiss the appeal, as it has to determine the cause upon its merits. (McGowan v. Superior Court, 153.)
2. **WRIT OF REVIEW—JURISDICTION OF SUPERIOR COURT—APPEAL FROM JUSTICE'S COURT—NOTICE OF FILING UNDERTAKING—EFFECT OF CHANGE IN CODE.**—The service of the notice of the filing of the undertaking on appeal from the justice's court to the superior court, as provided by section 978a of the Code of Civil Procedure, enacted November 11, 1909, is not necessary to give the superior court jurisdiction of the appeal; and an order refusing to dismiss the appeal for want of such service cannot be annulled upon writ of review. (W. P. Jeffries Co. v. Superior Court, 193.)
3. **STATUTORY CONSTRUCTION—PURPOSE OF CHANGE IN CODE.**—Statutory provisions are to be construed with reference to the intention and purpose of the enactment. The apparent evil to be remedied by the amendment of 1909 was the necessity that the owner of a judgment in the justice's court should watch the justice's docket for thirty days to prevent an appeal without adequate security; and this evil was remedied by the new provision for an undertaking within five days after the notice of appeal, and that notice of its filing be given to him. (Id.)
4. **OBJECT OF NOTICE OF FILING UNDERTAKING—PART OF COLLATERAL PROCEEDING FOR JUSTIFYING.**—The nature and object of the provision for notice of the filing of the undertaking is not to make it a step in the perfecting of the appeal, but to make it merely a part of the collateral proceeding to justify; its sole use being to bring home to respondent the knowledge that the appeal is already perfected *prima facie*. It merely invites the respondent to inspect the undertaking already filed. (Id.)
5. **PENALTY NOT ATTACHED TO FAILURE OF NOTICE.**—There is no provision in the statute as to the time within which the notice of the undertaking should be served, nor the effect of a failure to serve it. (Id.)

JUSTICE'S COURT (Continued).

6. **SUBSTANTIAL NOTICE—SERVICE OF NOTICE OF APPEAL—TIME FOR FILING UNDERTAKING FIXED BY LAW.**—The filing and service of the notice of appeal is in legal effect a notice that under the law the appellant must file his undertaking within five days thereafter to make his appeal *prima facie* effective. It therefore works no hardship that the technical notice of the filing of the undertaking is not given to the appellant, so as to require him to except to the sureties within five days after filing of the same, which is in fact required of him by law. (Id.)
7. **ABSENCE OF CHANGE AS TO TIME FOR EXCEPTING TO SURETIES.**—No change was made by the amendment of the code in 1909, as to the time within which the respondent must except to the sufficiency of the sureties on the undertaking on appeal. This is required to be done within five days after the filing of the undertaking, without reference to any notice of its filing. The provision for such exception is independent, and cannot be read into the prior provision. (Id.)
8. **JUSTIFICATION OF SURETIES—COLLATERAL PROCEEDING.**—The justification of the sureties after exception, or of other sureties in their stead, is not a step in taking an appeal, but is a collateral proceeding in which respondent exercises the right granted to him to obtain adequate security for his protection on the appeal. (Id.)
9. **WAIVER OF RIGHT.**—The respondent may waive his right to further security; and if he fails to exercise his right to except, or fails to attend before the court, when the sureties are in attendance to justify, his right is waived; and the original qualification of the sureties operates as a full and complete justification, and the appeal remains perfected and effectual under the original undertaking. (Id.)

See Criminal Law, 2-5; Habeas Corpus, 1, 2.

JUVENILE COURT.

1. **WRIT OF PROHIBITION—PETITION UNDER JUVENILE COURT LAW—PRELIMINARY EXAMINATION—PREMATURE ORDER—SURPLUSAGE—QUESTION OF JURISDICTION.**—Where a petition for a writ of prohibition to restrain a judge of the superior court from proceeding with a threatened preliminary examination of the petitioner charged with the violation of section 26 of the juvenile court law of 1909 [Stats. 1909, p. 213], shows that the judge indorsed an order of commitment on an affidavit of complaint, sworn to before a deputy county clerk, before any preliminary examination, it is evident that the order so indorsed was premature and without authority, and may be disregarded in determining the alleged want of jurisdiction of the judge to proceed with the preliminary examination as a committing magistrate. (Matter of Sing, 736.)

JUVENILE COURT (Continued).

- 2. EXCLUSIVE JURISDICTION OF MISDEMEANORS UNDER LOS ANGELES CHARTER — JURISDICTION UNDER JUVENILE COURT LAW.**—Although the Los Angeles charter confers exclusive jurisdiction of all misdemeanors committed within the city upon the police court and the city justice's court, yet such exclusive jurisdiction was divested as to all misdemeanors committed under the general juvenile court law, which is applicable to the superior court of Los Angeles county and all the superior courts in the state. It is immaterial, for the purposes of this decision, whether the jurisdiction of the superior court of Los Angeles county is exclusive or only concurrent as to misdemeanors under that law committed in the city of Los Angeles. (Id.)
- 3. JUVENILE COURT LAW CONSTITUTIONAL.**—The juvenile act violates no provision of the constitution. It is not a special act, affecting the punishment of offenses or the practice of courts of justice, but is a general law applicable to every county in the state, and to every superior court therein. While the constitution confers jurisdiction upon the superior court of all misdemeanors not otherwise provided by law, yet we have here a case where such jurisdiction is expressly conferred by a general law. (Id.)
- 4. PRELIMINARY EXAMINATION REQUIRED FOR INFORMATION FOR MISDEMEANOR UNDER JUVENILE ACT.**—The juvenile act making the offense charged a misdemeanor triable in the superior court, the provisions of the Penal Code applicable to information, and to a preliminary examination and commitment therefor, are conditions precedent to an information upon which only can the superior court proceed thereby to try one charged with a public offense, even though it be a misdemeanor of which it has jurisdiction. (Id.)
- 5. DUTY OF JUDGE SITTING AS MAGISTRATE AS TO OATHS.**—Although the complaint which institutes a criminal proceeding need not be verified, yet if properly verified, and containing positive evidence of facts tending to show guilt, it may be treated by the magistrate as a deposition; yet a superior judge sitting as a magistrate must administer all oaths as such, and has no right to call in a clerk or any other officer to administer oaths. He sits as a creature of the statute, with such powers only as are conferred upon justices of the peace or police judges. (Id.)
- 6. COMPLAINT VERIFIED BEFORE DEPUTY CLERK INEFFECTIVE.**—A complaint verified before a deputy county clerk is ineffective, either as a deposition upon a preliminary hearing, or as a deposition authorizing the issue of the warrant of arrest. (Id.)
- 7. ARREST IN FACT—ILLEGAL RESTRAINT NOT INVOLVED IN PROHIBITION AGAINST PRELIMINARY EXAMINATION.**—When the arrest has been actually made, and the petitioner for the writ of prohibition is before the judge for preliminary examination, no question of

JUVENILE COURT (Continued).

illegal restraint is involved in his petition, and the only question to be determined is whether the judge conducting such examination can be prohibited therefrom. (Id.)

8. **AUTHORITY OF JUDGE OF SUPERIOR COURT AS MAGISTRATE.**—When the prisoner arrested is before the judge of a court having jurisdiction as a magistrate to hold a preliminary examination, he may proceed to hold the same, and if a commitment issue, a foundation is laid for an information which cannot be set aside because the depositions were insufficient to warrant the arrest. (Id.)
9. **INSUFFICIENT PETITION FOR PROHIBITION.**—*Held*, that the petition presents no facts sufficient to authorize this court to prohibit the preliminary examination of the defendant before the judge of the superior court sitting as a magistrate under the juvenile act. (Id.)

LANDLORD AND TENANT. See Lease.

LARCENY. See Criminal Law, 152–167.

LEASE.

1. **ACTION BASED ON LEASE—EXPIRED TERM—OPTIONS TO RENEW AND PURCHASE—DAMAGES FOR WITHHOLDING—CAUSE OF ACTION NOT STATED.**—Where plaintiff's alleged rights to have a lease with options to renew and to purchase declared valid, and to recover damages for withholding possession of the leased land and the improvements thereon made by the lessee, are based upon the terms of the lease, the original term of which had expired, the plaintiff must by appropriate averments bring himself within its terms, and where he fails to allege any facts showing that the lease was renewed or extended, or that the options to renew or to purchase were in any way exercised, or that any rent was paid thereunder, it states no cause of action, and a demurrer to the complaint was properly sustained. (Loeffler v. Wright, 224.)
2. **NATURE OF ACTION—DAMAGES FOR FAILURE SPECIFICALLY TO PERFORM AGREEMENT TO LEASE.**—The action is essentially one to recover damages for a failure specifically to perform an agreement to lease for a period of years; and a person seeking such relief must show that he placed himself in such a position as to exact performance from the other party. (Id.)
3. **TIME FOR RENEWAL—NOTICE OF ELECTION.**—Under a contract for a renewal of the lease, as distinguished from an extension of the lease, the lessee desiring to renew must exercise his option to do so by giving notice of his election to renew before the expiration of the original term. (Id.)
4. **OPTION TO PURCHASE—ELECTION AND EQUITABLE RIGHT MUST APPEAR.**—An option to purchase contained in the lease must, for its

LEASE (Continued).

enforcement, not only be alleged to have been exercised by notice of the election to purchase during the life of the lease, but also an offer to pay the purchase money, or willingness to do so, must be alleged, and it must be further alleged that the contract of purchase was just and equitable. (Id.)

5. **BANKRUPTCY OF LESSOR—JURISDICTION OF DISTRICT COURT.**—When the corporation lessor was adjudged a bankrupt, the United States district court acquired complete and exclusive jurisdiction of the corporation's property, and to determine all controversies between the corporation and third parties affecting the assets in its custody. (Id.)
6. **COMPOSITION CONFIRMED—REVESTITURE OF PROPERTY—COLLATERAL ATTACK FOR IRREGULARITY.**—A composition confirmed by the district court, having the effect to revest title of the corporation to its remaining assets, cannot be collaterally attacked in a state court for irregularity in the order of composition not appearing on its face. (Id.)
7. **EXCLUSIVE REMEDY IN FEDERAL COURT FOR FRAUD—APPELLANT ESTOPPED.**—The exclusive remedy for fraud in obtaining the order of composition was by a proceeding in the district court under the bankrupt act providing for its annulment for fraud discovered within six months; and where appellant availed himself of that remedy, and his application was denied by the district court, the appellant cannot assail it in the state court, whether the composition be valid or a nullity. (Id.)
8. **RELIEF AGAINST DEED OF TRUST FOR MISREPRESENTATION OF CONTENTS—STATUTE OF LIMITATIONS—NOTICE OF CONTENTS.**—Relief against a deed of trust by the corporation lessor for fraud upon the plaintiff as lessee, consisting of misrepresentation as to its contents, was barred within three years after actual or constructive notice of the contents of the deed. (Id.)
9. **NOTICE OF DEED OF TRUST—SIGNATURE AND ACKNOWLEDGMENT BY PLAINTIFF AS SECRETARY—RECORD.**—The complaint shows both actual and constructive notice to plaintiff of the contents of the deed of trust, by alleging that it was signed and acknowledged by plaintiff as secretary of the corporation lessor, and was recorded, upon such acknowledgment, before the lease was executed, and presumably more than three years before the commencement of the action. (Id.)
10. **DATE OF FILING ORIGINAL COMPLAINT NOT SHOWN—PRESUMPTION—INTENDMENTS UPON APPEAL.**—Though the date of the filing of the original complaint is not shown by the record upon appeal, it must be assumed, in view of the intendments in favor of the ruling of the court below against the plaintiff, that the action was

LEASE (Continued).

brought more than three years after the execution of the deed of trust. (Id.)

11. **INSUFFICIENT AVERMENT—DATE OF DISCOVERY—REASONABLE DILIGENCE NOT AVERRED—PRESUMPTION.**—It is not sufficient for the plaintiff merely to allege that he did not discover the fraud until a certain date. It must also appear that the discovery could not have been made by the exercise of reasonable diligence; and the plaintiff is presumed to have known all that reasonable diligence would have disclosed. (Id.)
12. **DEMURRER SUSTAINED WITHOUT LEAVE TO AMEND—DISCRETION NOT ABUSED—PREVIOUS DEMURRERS—LEAVE NOT ASKED.**—The sustaining of the demurrer without leave to amend is within the discretion of the court below, subject only to review in case of clear abuse. No abuse of discretion appears where it appears that plaintiff made three ineffectual attempts to state a cause of action, and his record upon appeal does not disclose that he asked leave to amend when the present demurrer was sustained. (Id.)
13. **BUILDING VIOLATING FIRE ORDINANCE—LEGALITY OF CONTRACT—CONSIDERATION—ACTION FOR RENT.**—Although a contract founded upon an illegal consideration, or having for its purpose a violation of law, may not be enforced, yet a lease of a building constructed in violation of a fire ordinance, which does not in terms prohibit the lease, is not founded upon an illegal consideration, and if it is not made for any illegal purpose, an action for rent may be based upon such lease in favor of the owner of the building as lessor. (Wayman Investment Co. v. Wessinger, 108.)
14. **EVIL ACCOMPLISHED PRIOR TO LEASE—RIGHTS OF CITY—PROPERTY OF OWNER—ESTOPPEL OF LESSEE.**—In such case, the evil in the violation of the fire ordinance had been accomplished prior to the lease; and though perhaps the city might have ordered it removed, yet until this was done, it remained the property of the plaintiff as owner, and defendants could not take and enjoy the possession thereof under a lease, and dispute its validity, and refuse to pay the rent reserved. To allow such refusal would be to encourage a gross breach of fair dealing. (Id.)
15. **PROPERTY ACQUIRED IN VIOLATION OF LAW—SUBJECT OF LEGITIMATE CONTRACTS—ENFORCEMENT.**—The mere fact that property is acquired in violation of law does not rob it of its character as property, nor prevent it from being the subject of legitimate contracts which may be enforced in courts of law. (Id.)
16. **TEST OF ENFORCEMENT.**—Although there may be some illegal features connected with a transaction involved in a suit, yet the plaintiff may recover if his cause of action is otherwise legitimate, and he can make out his case without calling to his aid any illegality. The test of whether the demand can be enforced at law

LEASE (Continued).

is whether the plaintiff requires the aid of an illegal contract to establish his case. (Id.)

See Partnership, 1; Remainders, 19.

LEWD CONDUCT. See Criminal Law, 175.

LIENS. See Mechanics' Liens.

MANDAMUS.

1. **MANDAMUS.**—Where the facts are undisputed, and the law establishes the right of a party to an order, or to the relief which the court has refused, *mandamus* will lie; and where, as in this case, it is the duty of the court to enter the default of the defendant, which it has refused to do, owing to a misconception of the law, *mandamus* will lie to compel the court to discharge its duty by entering the default of the defendant. (California Pine Box etc. Co. v. Superior Court, 65.)

2. **ABSENCE OF LEGAL REMEDY OF PETITIONER.**—It cannot be said that the petitioner for the writ in this case has a plain, speedy and adequate remedy in the ordinary course of the law. There is no judgment or order from which an appeal will lie; and under the ruling of the court, petitioner cannot proceed, although the defendant has appeared and submitted itself to the jurisdiction of the court. (Id.)

See Appeal, 9; Municipal Corporations, 3, 5.

MEASURE OF DAMAGES. See Damages.

MECHANICS' LIENS.

1. **CONSOLIDATED ACTION—COMPLAINT WITHOUT ISSUE—STIPULATION—PROOF OF LIEN—JURISDICTION—JUDGMENT.**—In a consolidated action to foreclose mechanics' liens, when no issue was joined upon the complaint in the second action, but all parties were represented by counsel, and the second plaintiff was a defendant in the other action, and appellant was defendant in both actions, and it was stipulated at the trial that the evidence should inure to the benefit of all parties, and plaintiff in the second action proved its lien without objection, the fact that a judgment was rendered against the owner appealing in favor of the plaintiff on the second action implies that the court ascertained that it had jurisdiction both of the subject matter of the second complaint and of the person of appellant before rendering such judgment. (Western Lumber etc. Co. v. Merchants' Amusement Company, Pacific etc. Decorating Co. v. Mercantile Amusement Co., 4.)

2. **PRESUMPTION IN SUPPORT OF JURISDICTION.**—It will be presumed in favor of the jurisdiction of the superior court that the court

MECHANICS' LIENS (Continued).

acted upon evidence of some kind, when the record shows nothing to the contrary; and it must be presumed that the court properly discharged its duty to determine before hearing a controversy that it had jurisdiction of the cause and of the parties thereto. (Id.)

3. **PRESUMPTION OF VERITY OF RECORD.**—In all matters of which the judgment contains a record, its verity, in the absence of contrary evidence, will be presumed as fully as upon collateral attack. The record is conclusive as to all matters upon which it speaks, when not impeached by the bill of exceptions. (Id.)
4. **RECITAL IN JUDGMENT-ROLL—APPEARANCE OF APPELLANT—CONTEST OF LIEN.**—The recital in the judgment-roll that appellant appeared by attorney impliedly to contest the claims of lien of plaintiff in the second suit is supported by the record of the proceedings at the trial, without any attempt to impeach such recital or the evidence tending to establish its truth. (Id.)
5. **EFFECT OF APPEARANCE BY ATTORNEY.**—The voluntary appearance of a defendant by attorney is equivalent to personal service of the summons and complaint. (Id.)
6. **EVIDENCE OF APPEARANCE—JUDGMENT-ROLL—BILL OF EXCEPTIONS—CONTENTION UNSUSTAINED.**—Though the code does not require that an appearance shall be made part of the judgment-roll, yet when the judgment-roll recites that appellant appeared in both actions, and there is uncontradicted evidence in the bill of exceptions tending to support such recital, the contention of appellant that the court had no jurisdiction to render the judgment for plaintiff in the second action is unsustainable. (Id.)
7. **SUFFICIENCY OF COMPLAINT—ABSENCE OF DEMURRER—PROOF AT TRIAL—WAIVER OF OBJECTION.**—The objection that the second complaint is insufficient, in not averring either that any sum was due to the contractor, or that the contract price exceeded \$1,000, and that the contract was not recorded, was waived, and cannot be urged upon appeal for the first time, when no demurrer was interposed thereto, and it was clearly established by proof at the trial that the contract price far exceeded that sum, and the contract was not recorded. In such case, it was wholly immaterial whether any sum was due to the contractor. (Id.)
8. **NOTICE BY OWNER—CONSTRUCTION OF CODE.**—Section 1192 of the Code of Civil Procedure does not give to the owner of the property two periods of time in which he may give the notice of nonresponsibility provided for therein. If he has knowledge of the intention to build, he must act on that knowledge within three days thereafter; and if not, he must move with like promptness upon obtaining knowledge of the construction. (Id.)
9. **FINDING AS TO KNOWLEDGE RENDERED IMMATERIAL—CORPORATION LESSEE AGENT FOR OWNER.**—A finding that the owner did not give

MECHANICS' LIENS (Continued).

notice of nonresponsibility, within three days after knowledge of the intention to build, is rendered immaterial, where a finding is sustained by the evidence that the corporation was organized by the owner and his associates as an agency for the lease of the property thereto for the purpose of constructing a building thereon. (Id.)

10. **FINDING NOT INCONSISTENT WITH PLEADING.**—The averment of ownership by the individual owner, and of a lease to the corporation, which constructed the building on his property, is not inconsistent with a finding supported by the evidence that the owner was merely using the corporation as an agency for the construction of such building. (Id.)
11. **OWNER ACTING THROUGH AGENT FOR BUILDING NOT ENTITLED TO GIVE NOTICE.**—An owner who acts through an agent to secure the construction of a building on his land in the agent's name is not entitled to give notice of nonresponsibility under section 1192 of the Code of Civil Procedure. (Id.)
12. **INVALID CONTRACT—FAILURE TO RESERVE TWENTY-FIVE PER CENT AFTER COMPLETION.**—Where a building contract fails to reserve twenty-five per cent of the contract price after the completion of the building, as required by section 1184 of the Code of Civil Procedure, and reserves only twenty per cent thereof, the contract is invalid as against the claimants of mechanics' liens, who are entitled to enforce their liens as if there were no contract, and their work had been done or materials furnished at the special instance and request of the owner of the building. (Nofziger Lumber Co. v. Solomon, 621.)
13. **CONSTITUTIONAL ORIGIN OF MECHANICS' LIENS—LEGISLATURE REQUIRED TO PROTECT AND ENFORCE LIENS.**—Mechanics' liens, under the constitution of 1879, have a constitutional origin, and the legislature is required to provide for the speedy and efficient enforcement of such liens. The provisions which it has made for a fund of twenty-five per cent of the contract price for their enforcement cannot be depleted or reduced to the injury of any lien claimant without an infringement of constitutional right. (Id.)
14. **PROOF OF ACTUAL RETENTION OF TWENTY-FIVE PER CENT INADMISSIBLE.**—The request of the owners to be permitted to show that they actually retained twenty-five per cent of the contract price, though the terms of the contract did not provide therefor, was properly denied. An unrevealed intention to retain that amount, or the actual intention to retain the same, is not a compliance with section 1184 of the Code of Civil Procedure, which requires that, by the terms of the contract, twenty-five per cent of the whole contract price shall be made payable as therein provided. Evidence of the retention of the full amount, without such a provision in the contract, was, therefore, immaterial. (Id.)

MECHANICS' LIENS (Continued).

15. **PURPOSE OF VERIFICATION TO NOTICE OF LIEN.**—The purpose of the verification to the notice of a claim of lien is not to prove the lien when it is sought to enforce it in the courts; but the claim filed with the recorder, which is required to be verified, is but a notice by the claimant that he intends to avail himself of his right to a lien in the particular case. The verification of the claim by his own oath, or that of some other person, is required as evidence of good faith, and a *prima facie* support to his claim for the purpose of giving such notice only. (Id.)
16. **PURPOSE OF PROOF OF RECORDED CLAIM—ESTABLISHMENT OF REQUIRED NOTICE.**—The purpose of proof of the original recorded claim of liens is not to prove its contents, but to establish that notice has been given as required by law. It is entitled to admission when it is shown that it complies with the statutory requirements. (Id.)
17. **PUBLIC RECORD—ADMISSIBILITY.**—If the signature and verification were sufficient to entitle it to be filed with the recorder, and it was so filed, it became a public record, and thereafter became entitled to be received in evidence, under the rules governing the admission of private writings which may become public records by recording under the statute. (Id.)
18. **OBJECTION THAT "NO FOUNDATION WAS LAID."**—The objection that "no foundation was laid" for the admission of an original claim of lien, which bears the certificate of record, might cover the absence of evidence in the record that the lien was recorded. (Id.)
19. **SPECIFICATION OF PARTICULARS REQUIRED.**—When an objection is made that sufficient foundation has not been laid for the introduction of a writing or other evidence, the particulars wherein the foundation is insufficient must be specified. (Id.)
20. **INSUFFICIENT OBJECTION—ABSENCE OF PROOF OF SIGNATURE OR VERIFICATION.**—An objection that "no evidence other than the lien itself was offered or introduced as to the signatures of the parties or verification thereof" was properly overruled. No proof of the genuineness of the signatures to either the claim or the verification is a necessary preliminary to the admission in evidence of a lien properly verified and filed for record. (Id.)
21. **PROOF OF CONTRACT AND FURNISHING OF MATERIALS—ABSENCE OF OBJECTION.**—In the absence of any objection, the statement in the claim of lien may be accepted as proof of the person to whom the materials were furnished and the value of the materials furnished or labor done under the agreement with him. (Id.)

MISDEMEANOR. See Criminal Law, 17, 18.

MUNICIPAL CORPORATIONS.

1. **CHARTER CITY—PRIVATE IMPROVEMENTS NOT A "MUNICIPAL AFFAIR."**—The construction of improvements upon private property

MUNICIPAL CORPORATIONS (Continued).

- within a charter city is not a municipal affair. The city has no interest or control thereof, except such control as is made necessary for the protection of the public welfare. (*May v. Craig*, 368.)
2. **POLICE POWER.**—The only power which the city can exercise in relation to such private structures must come from the police power delegated by the constitution to charter cities, which is expressly made subordinate to the general law. (*Id.*)
 3. **COMPLAINT FOR MANDAMUS—COPY OF ORDINANCE NOT PRESENTED—JUDICIAL NOTICE.**—Where a complaint for *mandamus* does not set forth a city ordinance enacted by the city relating to the construction of buildings therein, the court cannot take judicial notice thereof. (*Id.*)
 4. **QUESTION OF CONFLICT OF ORDINANCE WITH GENERAL LAW.**—An ordinance may simply exact requirements additional to the general law, which, if true, would not conflict therewith; but if the ordinance undertakes to make lawful that which by the state law is declared unlawful, a conflict would arise, and the ordinance must yield to the general law. (*Id.*)
 5. **DUTY OF BOARD OF PUBLIC WORKS TO ISSUE PERMIT—MANDAMUS REFUSED.**—In order that the duty should devolve upon the board of public works of the city to issue a building permit, it must be made to appear that no conflict exists between the ordinance and the general law; otherwise the determination of the board in refusing the permit should be sustained, and a writ of mandate thereto was properly refused. (*Id.*)
 6. **SAN FRANCISCO CHARTER—VOID APPOINTMENT OF DEPUTY REGISTRARS—VIOLATION OF CIVIL SERVICE PROVISIONS.**—Appointments of deputy registrars by the board of election commissioners of the city and county of San Francisco, not made from the list of civil service eligibles provided for in the charter, none of whom had taken the competitive examination provided for therein, and which were made in entire disregard of the civil service provisions of the charter, were void, and conferred no rights upon the appointees. (*Shaw v. City and County of San Francisco*, 547.)
 7. **ACTION FOR REASONABLE SERVICES NOT TENABLE.**—Such appointments being void, no action will lie in favor of the appointees to recover from the city and county the reasonable value of their services. Such an action is contrary to the settled rule in this state. (*Id.*)
 8. **CHARTER PROVISIONS NOT ALLOWED TO BE FRITTERED AWAY.**—To permit a liability to be imposed upon the city and county to pay for services rendered under appointments made contrary to the express provisions of its charter declaring the same to be void would be to fritter away the entire scheme for civil service appointments contained in the charter. (*Id.*)

MUNICIPAL CORPORATIONS (Continued).

9. **DUTY OF APPOINTEES TO SECURE VALID APPOINTMENTS—ASSUMPTION OF RISK.**—The appointees were bound to see that their appointments were made according to the requirements of the charter, which they ought to have known. If they neglected this, or chose to take the hazard of accepting a void appointment, they were mere volunteers, and suffer only what they should have anticipated. (Id.)
10. **CITIES ORGANIZED UNDER MUNICIPAL CORPORATIONS ACT—SUBORDINATION TO GENERAL LAW IN MUNICIPAL AFFAIRS.**—Cities organized under the municipal corporations act are subordinate to the general law with reference to municipal affairs. (Dawson v. Superior Court, 582.)
11. **CITIES EXEMPT FROM CONTROL OF GENERAL LAW IN MUNICIPAL AFFAIRS.**—Under section 6 of article XI of the constitution of this state, as amended in 1896, there are but two classes of municipal corporations exempt from the control of general law in municipal affairs, comprising those cities organized by special legislative charter prior to the adoption of the constitution of 1879, and cities operating under a freeholders' charter under that constitution. (Id.)
12. **JURISDICTION OF ELECTION CONTESTS UNDER MUNICIPAL CORPORATIONS ACT NOT EXCLUSIVE—CONCURRENT JURISDICTION OF SUPERIOR COURT.**—The jurisdiction of election contests conferred upon the common council of cities, organized under the municipal corporations act to hear and determine election contests, is not exclusive, but is merely concurrent with that conferred upon the superior court by the constitution and laws of the state. (Id.)
13. **GENERAL RULE—EXCLUSIVE JURISDICTION NOT INFERRED.**—Where jurisdiction is conferred upon a court or body to exercise judicial functions, exclusive jurisdiction is not to be inferred, and is only to be so regarded where the language is so plain as to show the legislative intent in that regard. (Id.)

See Elections; Taxation.

MURDER AND MANSLAUGHTER. See Criminal Law, 176-249.

NEGLIGENCE.

1. **PASSENGER RIDING OUTSIDE OF CAR—INJURY FROM PASSING CAR—ASSUMPTION OF RISK—MIXED INFERENCE OF FACT AND LAW.**—A passenger riding on the outside of an electric car near the track on which other cars were passing assumed all the risks of riding where he did which the facts of the case disclosed were incurred by him. Such assumption of risk is a mixed inference of fact and law, and not a mere conclusion of law. (Morgan v. Los Angeles Pacific Co., 12.)

NEGLIGENCE (Continued).

2. **CONSTRUCTION OF LANGUAGE OF TRIAL JUDGE—"ASSUMED RISK."**
The language used by the trial judge in passing upon the motion for a new trial, "that plaintiff assumed the risk in riding where he did," must be construed so as to support the court's action, and not as declaring that assumption as a mere conclusion of law. Taking the most favorable view of the evidence in support of the order, no risk due to a defective rail or to a lurch of the car was referred to in using such language. (Id.)
3. **INSTRUCTIONS AND EVIDENCE TO BE CONSIDERED BY JUDGE.**—For the purpose of passing upon the motion for a new trial, the trial judge must consider the instructions given to the jury and all evidence received without objection, whether competent or not; and he must determine the sufficiency of the evidence to sustain the verdict, in the light of the same facts and law that were before the jury. (Id.)
4. **SAFETY-BAR NOT REQUIRED BY LAW—CORRECT INSTRUCTION.**—The court correctly instructed the jury that there was no law requiring the defendant to maintain a safety-bar on the side of the car on which plaintiff was riding. (Id.)
5. **ABSENCE OF SAFETY-BAR NOT NEGLIGENCE PER SE.**—It was not negligence *per se* not to have a safety-bar on either side of the car. (Id.)
6. **PROVINCE OF JURY—NEGLIGENCE AS TO SAFETY-BAR A QUESTION OF FACT.**—The instruction given as to the law did not preclude the plaintiff from showing or the jury from considering whether or not it was negligence upon the part of the defendant not to provide a safety-bar under such circumstances as existed here. (Id.)
7. **ACTION FOR DEATH—NEGLIGENCE OF DRAYAGE CORPORATIONS—COLLISION—NEGLIGENCE OF SINGLE COMPANY—NONSUIT.**—In an action for the death of plaintiff's intestate, caused while he was engaged in his usual avocation upon a railroad box-car, by the collision of loaded drayage teams belonging to the corporations appellant, it is held, upon examination of the record upon appeal, that the liability for the death is limited to the last-named corporation appellant, and that the Morton company, appellant, was entitled to a nonsuit, there being insufficient evidence to sustain the verdict as to it. (Sullivan v. Morton Draying and Warehouse Co., 35.)
8. **CONSTRUCTION OF CITY ORDINANCE—FORBIDDEN USE OF UNLOCKED DRAY—QUESTION FOR CITY AUTHORITIES.**—A part of a city ordinance which makes it unlawful to drive or use a truck or dray without having attached to the body thereof a suitable chain for locking its wheels, presents only a question for the city authorities, and does not involve the question of negligence. (Id.)
9. **STATUTORY NEGLIGENCE—LEAVING TEAM AND DRAY IN STREET UNLOCKED.**—A provision of such ordinance making it unlawful for any

NEGLIGENCE (Continued).

person to "leave" any animal controlled by him, if attached to a dray or truck, upon the public street, without first securely locking its wheels, when violated, presents a case of statutory negligence, for which the owner of such team would be responsible. (Id.)

10. **ORDINANCE NOT VIOLATED—ABSENCE OF STATUTORY NEGLIGENCE—TEAM AND DRAY NOT LEFT.**—Where the teamster, after loading his dray, did not "leave" the same in the street within the meaning of the ordinance, but turned his horses away from the box-car, and proceeded to fasten his loaded dray with ropes, when another team negligently collided with his team, and frightening the same made them back onto the box-car causing the death, the death was proximately caused by such colliding team, and the owner of the frightened team is not chargeable with statutory negligence. (Id.)
11. **MEANING OF WORD "LEAVE" IN ORDINANCE.**—The word "leave," as used in the ordinance, is to depart or go away from, to quit; and the ordinance means to abandon for a time, to go away from the immediate charge and supervision of the animal or animals so left. (Id.)
12. **PENAL NATURE OF ORDINANCE—CONSTRUCTION—ORDINARY SENSE OF WORDS.**—The ordinance is penal in its nature, and cannot be extended beyond its plain words, and in its ordinary common sense meaning. No ordinary person would say that a teamster tying up his load had left his team. (Id.)
13. **BURDEN OF PROOF OF NEGLIGENCE—BURDEN NOT SUSTAINED.**—A plaintiff seeking to recover against a defendant for negligence has the burden to prove it, either directly or by facts and circumstances from which negligence may be inferred. *Held*, that such burden was not sustained to show any liability of the Morton company, appellant, under the ordinance in question by reason of its teamster being engaged in fastening up his load, though not holding his lines while so engaged. (Id.)
14. **EVIDENCE—SUFFICIENT WIDTH OF SPACE BETWEEN TEAMS FOR PASSAGE—HARMLESS ERROR.**—Any error in excluding evidence offered by the Bocarde company to prove that there was an amply sufficient width of space for passage of its team between the Morton team and the railroad track, was harmless, where such proof was otherwise made, and where proof of such sufficient width made it all the more inexcusable negligence for the Bocarde team to collide with and frighten the Morton team, thus causing it to back upon the box-car. (Id.)
15. **EXPERT EVIDENCE PROPERLY EXCLUDED—MATTER OF COMMON KNOWLEDGE—PROVINCE OF JURY.**—The testimony of experts as to how near a team may drive in relation to another team in the exercise of care and skill in approaching the same and driving past without danger was properly excluded, such question not being one

NEGLIGENCE (Continued).

relating to science, art or trade, but being a matter of common knowledge for the jury to determine. It is well known that most animals will shrink or retire from approaching danger, and that a team of horses, upon being run into or struck by the harness or wagon of an approaching team, would be likely to pull back or retire, so as to avert the danger. (Id.)

16. **AMENDMENT OF COMPLAINT—CHARGE OF ABSENCE OF LOCK ON WHEELS.**—It was not error for the court to allow an amendment to the complaint to charge that the Morton company was negligent in driving its truck without any suitable chain for locking its wheels. The Bocarde company cannot complain of such amendment. (Id.)
17. **INSTRUCTIONS—ABSTRACT REQUEST INAPPLICABLE TO EVIDENCE.**—An appellant was not injured by the refusal of a requested instruction, which, though abstractly correct, was inapplicable to the evidence, it appearing that the court gave other instructions fully covering the law applicable to such appellant. (Id.)
18. **FINDINGS—CONSISTENCY—PROXIMATE CAUSE OF DEATH.**—The findings of the jury upon special issues submitted to it are held not to be inconsistent with each other or with the general verdict. The court found upon sufficient evidence that the driver of the Bocarde team carelessly and negligently drove his team in front of the horses of the Morton company; that this caused the Morton company team to back, and that this was the proximate cause of the injury to the deceased. (Id.)
19. **IMMATERIAL FINDING—ABSENCE OF CHAIN ON WHEELS OF MORTON COMPANY—NEGLIGENCE OF OTHER COMPANY NOT EXCUSED.**—The finding to the effect that if the Morton company had supplied its dray with a suitable chain, and that if the chain had been used and the wheels locked the accident would not have occurred, is not material, and does not in any way excuse the negligence of the Bocarde company. Unless the Morton company was guilty of negligence by reason of the violation of the ordinance, the condition and equipment of its dray was wholly immaterial. (Id.)
20. **MOVING OF TIMBER JAM—INJURY TO PLAINTIFF'S LEASEHOLD—SUPPORT OF VERDICT.**—In an action for damages to plaintiff's leasehold alleged to have resulted from defendant's negligence in moving an immense timber jam existing in a stream above plaintiff's property, so as to cause it to break a dike on plaintiff's land, and causing a flooding thereof with debris from the stream, to the destruction of a great part of plaintiff's grazing land, and to the serious injury of his dairy business, it is held that a verdict for damages to plaintiff's leasehold from defendant's negligence in the sum of \$3,500 was fully warranted by the evidence. (Sacchi v. Bayside Lumber Co., 72.)

NEGLIGENCE (Continued).

21. **QUESTIONS FOR JURY—DISPUTE AS TO CAUSE OF DAMAGE—EFFECT OF VERDICT.**—The questions whether the damage was caused by the logging operations of the defendant, negligently conducted, as claimed by plaintiff, or was caused by the operations of a rock quarry, as claimed by defendant, were for the jury to determine. The verdict for the plaintiff is indubitable evidence that the damage was the direct result of defendant's negligence. (Id.)
22. **DISPUTE AS TO OPERATIONS BY INDEPENDENT CONTRACTORS OR BY DEFENDANT'S AGENTS—SUBMISSION TO JURY.**—The court properly submitted to the jury the question whether persons receiving a fixed compensation for their services were independent contractors or were agents acting under the supervision of the defendant, where there is a dispute and conflicting evidence on that subject; and the verdict of the jury for the plaintiff is conclusive that they were agents and not independent contractors. (Id.)
23. **NATURAL RESULT OF OPERATIONS—KNOWLEDGE AND ANTICIPATION BY DEFENDANT.**—The natural result of the operations of the defendant in removing the original jam from its position above plaintiff's land must necessarily have been known to, and anticipated by, defendant and its officers. (Id.)
24. **VERDICT CONCLUSIVE ON QUESTIONS OF FACT.**—The verdict of the jury is conclusive on all questions of fact submitted thereto by the court or involved in the case. (Id.)
25. **EVIDENCE BEARING ON DAMAGES—PRODUCTION OF LAND DURING PREVIOUS YEAR.**—Evidence as to what the land leased by plaintiff produced in the year previous to that in which the damage was sustained was admissible as tending to show the adaptability of the land damaged to the cultivation of crops growing thereon, and its capacity for producing crops in such quantity as was essential to the dairy business. (Id.)
26. **DIMINISHED VALUE OF LEASEHOLD—RENTAL VALUE OF DAMAGED LAND—COST OF RESTORATION.**—Evidence was admissible to show the diminished value of the leasehold during the remainder of the term by reason of the damage caused to the land from defendant's negligence, and, to that end, to prove the rental value of the damaged land per acre, and the cost of restoring the land to the condition in which it was when submerged. (Id.)
27. **OTHER ELEMENTS OF DAMAGE—DAIRY COWS—BUTTER FAT—COST OF KEEPING ON OTHER LAND.**—Evidence of the number of dairy cows kept by plaintiff, of the quantity of butter fat produced from them in the previous year, and of the cost of maintaining them on other land which he was compelled to rent for that purpose, was admissible on the question of damages. (Id.)

NEGLIGENCE (Continued).

28. **ALL PROOFS OF DAMAGE TO BE CONSIDERED TOGETHER.**—All of the proofs relating to the questions of damages are to be considered together, as furnishing as fair a foundation as can be shown or approximately laid to arrive at a just and reasonable assessment of damages. (Id.)
29. **DAMAGES PROVED NOT REMOTE OR SPECULATIVE—INJURY TO PARTICULAR CROP AND BUSINESS—LOSS OF PROSPECTIVE PROFITS.**—The damages proved are not remote or speculative. It is always admissible to prove that land damaged is peculiarly adapted to a particular kind of crop, and what it is capable, under ordinary circumstances, of growing as to kind and quality, and to prove and recover the loss of prospective profits which would naturally flow from a business damaged, had such business not been destroyed or impaired, so as to obstruct its prosecution in the ordinary way in which it has always been conducted. (Id.)
30. **MEASURE OF DAMAGES—DAMAGE LIKELY TO RESULT FROM TORT.**—The damages which, in the ordinary course of things, would be likely to result from a wrongful or tortious injury to property are the basis or measure of compensation to which the plaintiff is entitled for the injury so inflicted. (Id.)
31. **INSTRUCTIONS—ACTION UPON REQUESTS.**—*Held*, that, considering the entire charge of the court, every principle of law applicable to the issues and evidence was correctly declared and explained to the jury with clearness; that correct instructions requested and disallowed were otherwise given in the charges, and that, where requests were modified, it was either because the part modified was either inapplicable or incorrectly stated, or announced elsewhere. (Id.)
32. **INAPPLICABLE REQUEST—INJURIES CAUSED BY "ACT OF GOD."**—Where there was no evidence to justify a requested instruction that if the jury found that the injuries to plaintiff's property were caused by the "act of God," defendant would not be liable, it was properly disallowed. (Id.)
33. **IMPROPER REQUEST—BRIDGES FOR PASSAGE OF COWS—LOSS—LEASEHOLD PROPERTY—DUTY OF REPAIR.**—The court properly disallowed a requested instruction that if the bridges spanning small sloughs on plaintiff's land, for the passage of his cows, were part of the realty, plaintiff could not recover for their destruction, where it appears that such bridges were a part of plaintiff's leasehold, and that it was plaintiff's duty to keep the bridges and other fixtures on the land leased in repair. (Id.)
34. **MISLEADING REQUESTS—GENERAL RIGHT TO PROTECT PROPERTY.**—Where the court had given a proper instruction as to the right of defendant to protect its railroad trestle from injury or destruction by removing the jam therefrom with ordinary care, and

NEGLIGENCE (Continued).

with a view to the rights of others below, the court properly refused general and indefinite instructions as to the right of any person to protect his property with the use of ordinary care, which were calculated to mislead the jury that the big jam was wholly disturbed to protect property, when in truth the sole purpose thereof was to utilize part of the timber composing it, and it appears probable that if the body of the jam had been undisturbed, the winter rains would have carried the whole through the stream into Humboldt bay without injury to plaintiff's leasehold. (Id.)

85. **VERDICT NOT EXCESSIVE—REVIEW UPON APPEAL.**—*Held*, that the face of the record does not show that the verdict was excessive, but shows that the evidence amply justified the amount of damages awarded. The appellate court is not warranted in substituting its judgment for that of the jury and of the trial judge. (Id.)

NEGOTIABLE INSTRUMENTS. See Assignment; Attachment; Corporation, 1-14; Promissory Note.

NEW TRIAL.

1. **ORDER GRANTING NEW TRIAL—GROUNDS OF MOTION—GENERAL ORDER—REVIEW UPON APPEAL.**—Where the grounds of a motion for a new trial were insufficiency of the evidence to justify the decision, newly discovered evidence based upon affidavits, and errors of law occurring at the trial, a general order granting the motion will not be disturbed upon appeal, unless it appears that the making of the order constitutes an abuse of discretion. (Prouty v. Rogers, 561.)
2. **QUIETING TITLE—CONTRACT OF PURCHASE—CONFLICTING EVIDENCE—AGENCY AND TRUST FOR PURCHASER—NOTICE—NEW EVIDENCE—PROPER ORDER GRANTING NEW TRIAL.**—In an action to quiet title, where conflicting titles rested upon a contract of purchase, and findings for the defendants were made upon conflicting evidence that the contract was not complied with, that the female plaintiff was a grantee of the purchaser, whose deed did not describe the land sued for, and that the female defendant's deed from the vendor and original purchaser was without notice of plaintiffs' deed, but there is evidence in the record from which the court might conclude, in its order granting a new trial to plaintiffs, that the grantee of the purchaser was a corporation which was a mere agency and trustee for the purchaser, that the defendant had actual and constructive notice of plaintiffs' deed, and also that the newly discovered evidence conflicted with its findings, the court did not abuse its discretion in granting the new trial. (Id.)
3. **REFUSAL TO DISMISS PROCEEDINGS—BILL OF EXCEPTIONS—AMENDMENTS ACCEPTED—FAILURE TO SERVE SETTLED BILL.**—The court properly refused to dismiss the proceedings on motion for a

NEW TRIAL (Continued).

new trial, merely for failure to serve the adverse party with the settled bill of exceptions, where it appears that, after service of the proposed bill and amendments thereto, the amendments were expressly accepted by the moving party. In such case, no notice of the settlement of the bill is required, and the settled bill is only required to be filed, without service thereof upon the adverse party. (Broadus v. James, 478.)

4. **REQUIREMENT OF SERVICE OF SETTLED BILL—CONTROVERTED AMENDMENTS—NOTICE OF SETTLEMENT.**—The requirement of service of a settled bill of exceptions is limited by the statute to the case where the proposed bill and proposed amendments are controverted. In such case, notice of the hearing for the settlement of the bill is essential; and when the bill is settled, it must be engrossed by the moving party, and presented by him for proper certification within five days, after which the certified bill must be served upon the adverse party. (Id.)
5. **FOLLOWING STATUTE IN PARTICULAR CASE.**—While it is true that an appellant must follow closely the provisions of the statute, in order to have his appeal perfected, it is equally true that he is not required to do more than the statute demands in the particular case. (Id.)
6. **ACTION FOR NEGLIGENCE—VERDICT FOR PLAINTIFF—ORDER GRANTING NEW TRIAL—INSUFFICIENCY OF EVIDENCE—AFFIRMANCE.**—In an action to recover damages for alleged negligence, in which a verdict was rendered for the plaintiff, an order granting a new trial for insufficiency of the evidence to sustain the verdict will be affirmed under the rules applicable to the action of the trial court upon all matters pertaining to the weight of evidence and the credibility of witnesses. (Morgan v. Los Angeles Pacific Co., 12.)
7. **DUTY OF TRIAL COURT DISTINGUISHED.**—There is an obvious distinction between the duty of the trial court and the duty of the appellate court with respect to the decision of questions of fact on a motion for a new trial. The trial court cannot rest upon a conflict of the evidence, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it. Where the decision is against the weight of the evidence, it is the duty of the trial court to grant a new trial. (Id.)
8. **REVIEW OF ORDER GRANTING NEW TRIAL—DISCRETION.**—Where the trial court has discharged its duty to grant a new trial, for insufficiency of the evidence, its order will not be reversed upon appeal, unless it appears that there has been an abuse of the sound legal discretion which the trial court is presumed to exercise in granting a new trial. It is only in rare instances and on very strong grounds that the appellate court will set aside an order granting a new trial. (Id.)

NEW TRIAL (Continued).

9. **MOTION FOR NEW TRIAL—STATEMENT OF CASE—AUTHENTICATION BY JUDGE ESSENTIAL.**—Where a party moving for a new trial gives notice that it will be upon a statement of the case, it is his duty to propose such a statement, and have it settled, signed and certified by the judge; and it must be so authenticated before it can be filed with the clerk. Without such signature and certificate of the judge there is no statutory statement on which the motion may be heard; and an unauthenticated paper printed in the transcript is no part of the record upon appeal and must be disregarded. (*Finnall v. Merriman*, 609.)
10. **EFFECT OF STIPULATION IN TRANSCRIPT AS TO RECORD—EVIDENCE NOT MADE REVIEWABLE.**—A stipulation in the transcript that it contains a correct copy of the record, including the instructions given and refused by the court, as well as the statement on motion for a new trial, cannot have the effect to present such statement to the court as a basis for a review of the evidence therein contained. (*Id.*)
11. **ERROR IN INSTRUCTIONS NOT SHOWN.**—Conceding, for the purposes of the case, that the stipulation presents the instructions given and refused, yet this court cannot say, in the absence of any evidence in the record presented upon the trial that can be considered, that the giving or refusal of such instructions constituted reversible error, especially where there is nothing in the record indicating that the giving or refusal of such instructions was properly excepted to at the time. (*Id.*)
12. **INTENDMENTS IN FAVOR OF SUSTAINING INSTRUCTIONS.**—All intendments are in favor of sustaining the instructions of the court, and if such instructions are proper upon any possible view of the evidence, the action of the court thereon must be sustained. (*Id.*)
13. **ORDER GRANTING NEW TRIAL—GROUNDS OF MOTION—GENERAL ORDER—REVIEW UPON APPEAL.**—Where the notice of motion for a new trial specified as the grounds of the motion insufficiency of the evidence to justify the verdict, that the verdict is against law, and errors of law occurring at the trial and excepted to by the defendant, and the order granting the new trial was general, if the court could reasonably, in the exercise of a sound discretion, have granted the motion on any one of the grounds assigned, the order granting the new trial will not be disturbed upon appeal. (*Eidinger v. Sigwart*, 667.)
14. **SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE.**—Though specifications of insufficiency of the evidence should preferably be in the negative form, yet the substance of the specifications is to be considered rather than the form; and it is sufficient that it is readily ascertainable from the specification wherein the moving party claims that the evidence is insufficient to justify the verdict; and this is all that should be required in a bill of exceptions or state-

NEW TRIAL (Continued).

ment on motion for a new trial, where the insufficiency of the evidence to justify the verdict is one of the grounds of the motion. (Id.)

15. **COMPLAINT UPON QUANTUM MERUIT—PROOF OF EXPRESS CONTRACT—NONSUIT DENIED—EXCESSIVE RECOVERY.**—Where the complaint was based upon a *quantum meruit*, and the proof disclosed that the services were based solely upon an express contract, and not only was a nonsuit denied for the variance, but the verdict was at the rate of five dollars a day on the implied contract, while the express contract was limited to three dollars per day, the court might properly grant a new trial for insufficiency of the evidence to justify the verdict. (Id.)
16. **RECOVERY LIMITED TO CAUSE OF ACTION PLEADED.**—The plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed in the proof. (Id.)
17. **VARIANCE CLEARLY SHOWN.**—That there was a variance between the implied contract declared upon and the express contract proved, there is no ground for possible doubt. (Id.)
18. **QUESTION AS TO NONSUIT UNDETERMINED.**—Whether, in view of the fact that there was evidence in the record from which the conclusion might reasonably follow that the alleged services were reasonably worth the sum of three dollars per day, the variance might be held to be fatal or of such vital importance as to have entitled the defendant to a favorable ruling on the motion for a nonsuit, need not be determined. (Id.)
19. **FACT OF VARIANCE TO BE CONSIDERED WITH OTHER TESTIMONY—GROUND FOR NEW TRIAL.**—The fact of the variance, however, whether sufficient to have warranted the granting of the motion for nonsuit or not, when considered with other testimony, possesses some importance in determining whether the court abused its discretion in its order granting a new trial upon the ground of insufficiency of the evidence to justify the verdict, and presumably from the record that was one of the grounds, if not the principal ground, upon which the new trial was granted. (Id.)
20. **QUESTIONS REFLECTING UPON RIGHT OF RECOVERY.**—In connection with other questions reflecting upon plaintiff's right of recovery, it is further asked, if plaintiff was employed under an express contract, why did he present a claim to the executor based on an implied contract for greater compensation than that agreed upon and plead the latter in his action against the estate? It is held that all of the questions suggested would naturally present themselves to the trial judge in the consideration and decision of the motion for a new trial. (Id.)

NEW TRIAL (Continued).

- 21. EVIDENCE JUSTIFYING NEW TRIAL.**—It is held that, in any event, the evidence appearing in the record is such that this court cannot say that the trial court abused its discretion in granting a new trial. (Id.)
- 22. DISCRETION OF TRIAL COURT AS TO NEW TRIAL ORDER—INSUFFICIENCY OF EVIDENCE—CONFLICT.**—The granting or denial of a new trial on the ground of insufficiency of the evidence to justify the order, where there is a substantial conflict in the evidence, rests so largely in the discretion of the trial court that its action is conclusive upon the appellant, unless it appears that there has been an abuse of discretion. (Id.)
- 23. DUTY OF TRIAL COURT.**—When the evidence is conflicting, the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of the evidence, it is its duty to grant a new trial. (Id.)

See Appeal, 19, 22; Criminal Law, 6, 7, 152.

NOTARY PUBLIC. See Attachment, 5-11.

NOTICE. See Boundary.

NOVATION. See Contract, 31.

OFFICE AND OFFICERS. See Municipal Corporations, 6-9; Notary Public.

ORDINANCE. See Criminal Law, 17-24; Negligence, 8-12.

PARENT AND CHILD.

- 1. ESTATE AND GUARDIANSHIP OF INFANT—PETITION OF MOTHER REFUSED — UNFITNESS — FINDING UNSUSTAINED — REVERSAL UPON APPEAL.**—Upon appeal by a mother, after the death of the father, from an order refusing her petition for appointment as guardian of the person and estate of her young child three years of age, upon a finding of her unfitness to have the care and custody of the child, where the evidence fails to sustain such finding, the judgment and order denying her petition must be reversed. (Estate of Lindner, 208.)
- 2. RIGHT OF MOTHER TO CUSTODY OF CHILD.**—Upon the death of the father, the mother is *prima facie* entitled to the custody of her young child, and cannot be deprived thereof, unless shown to be unfit by sufficient testimony. As against everyone except the father, the mother is by the law of God and man entitled as of right to the custody of her own child, and cannot be deprived thereof except upon a clear showing of her unfitness for the exercise of such right. (Id.)

PARENT AND CHILD (Continued).

3. **PRIOR RIGHT OF PARENTS.**—The prior right of parents to the custody of their children under fourteen years of age cannot be disregarded except upon the most compelling reasons proved and sustained by the court. (Id.)
4. **WIFE'S SUIT FOR DIVORCE—TEMPORARY CUSTODY OF CHILD—PATERNAL UNCLE AND AUNT—EXPLANATION OF CONDITION OF CHILD.**—Where pending the wife's suit for divorce the husband had placed the child with a paternal uncle, and by temporary agreement sanctioned by the court the husband was allowed to place it with its paternal aunt, the unkempt condition of the child testified to by the aunt was explained by its coming to her from the custody of its uncle and not from the wife, who testified that she always kept it clean. (Id.)
5. **FAILURE OF MOTHER FREQUENTLY TO VISIT CHILD EXPLAINED.**—The fact the mother seldom visited the child during the life of the husband was explained by advice of her counsel not to visit it until she got her interlocutory decree, which was obtained two days before the death of the husband, after which she tried through her affection for the child to regain its custody. (Id.)
6. **ABSENCE OF SHOWING AS TO MORAL UNFITNESS—HEALTH OF CHILD.** *Held*, that there was no testimony that the child had ever been ill, or that anything existed in the life of the mother that would militate against the moral well-being of the child. (Id.)
7. **GENERAL STATEMENTS BY UNFRIENDLY WITNESSES—OPPORTUNITIES OF OBSERVATION NOT SHOWN.**—General statements by manifestly unfriendly witnesses, who are the brothers and sisters of the divorced husband, to the effect that the child was always filthy and that the mother did not keep her house clean, without any showing as to the opportunities possessed by them for real knowledge, do not meet the requirements of such evidence. (Id.)
8. **FINDING UNSUPPORTED.**—Such general statements are not sufficient to warrant a finding that the mother was not a fit and proper person to have the care and custody of her own baby, there not being one word tending to show any loose or immoral conduct upon her part, or any neglect that has ever injured the health or physical well-being of the child. (Id.)
9. **RIGHT OF MOTHER TO REAR HER OWN OFFSPRING.**—A mother who is both capable and willing and anxious to rear her own offspring should not be deprived of the opportunity thus to discharge the duty she owes to the child, without a clear showing of unfitness for the trust. (Id.)

See Deed, 6-16.

PARTNERSHIP.

1. **LEASE TAKEN IN NAME OF PARTNERSHIP—VALUABLE ASSET.**—Where a lease was taken in the name of the partnership for the purpose

PARTNERSHIP (Continued).

of carrying on its business, such lease is a valuable asset of the business. (Whitley v. Bradley, 720.)

2. **PARTNERS NOT PUTTING MONEY INTO BUSINESS—EVIDENTIARY FACT—FINDING.**—The fact that plaintiffs, as members of the partnership, did not put money into the business, does not change the situation as to the fact of partnership. It is a mere evidentiary consideration which cannot overthrow the finding as to the existence of the partnership. (Id.)
3. **JOINT OWNERSHIP OF PROPERTY IN PARTNERSHIP NOT ESSENTIAL TO PARTNERSHIP.**—To constitute a partnership it is not essential that there should be property forming the capital jointly owned by the partners; nor does it follow that because one partner may not put up his share of the capital under an agreement to form a partnership, the combination so formed is any less a partnership. (Id.)
4. **PARTNERSHIP AGREEMENT—EQUAL SHARES IN PROFITS—SHARE IN LOSSES IMPLIED.**—Where the express agreement was that the partners should at all times share equally in the profits of the business, it is implied, in the absence of a stipulation to the contrary, that they should also share equally the burden of its losses. (Id.)
5. **TRANSFER OF STOCK IN CORPORATION—UNEQUAL SHARES—PARTNERSHIP ASSETS NOT INURING TO CORPORATION.**—Where it appears that no part of the business or assets of the corporation was in fact transferred to the corporation, it cannot be claimed that the partnership assets inured equitably to the corporation, where the stock was not equally distributed pursuant to the partnership agreement, but defendant, in violation thereof, demanded and had issued to himself more than one-half of the capital stock, instead of one-third thereof, under the partnership agreement for equal shares. (Id.)
6. **TRANSFER OF STOCK NOT CONVEYING PARTNERSHIP PROPERTY.**—The transfer of stock by one of the partners to another cannot make the former any the less a partner in the property and business which were not transferred to the corporation, and could not inure to its benefit on account of unequal shares issued therein. (Id.)
7. **INJUNCTION—DISPUTED DEMAND—PAYMENT INTO COURT—CONTRACT BETWEEN PARTNERS—MERE MONEY ALLOWANCE—JURISDICTION OF APPEAL.**—Where the action was brought to enjoin a construction company from paying a residue to partners defendants, who had completed a contract to prepare a section for a railroad, and the equitable element was eliminated by the payment of the money into court, and the plaintiff is an assignee of a partner who had refused to complete the contract, and had quit work, and the case did not involve a settlement of the partnership business, but a mere money demand by such assignee, as to the amount due his assignor for work done, under a contract between the partners, and the only

PARTNERSHIP (Continued).

judgment rendered for plaintiff was for the value of the work and labor done by his assignor, this court has jurisdiction of an appeal therefrom. (Swanson v. Wilsen, 389.)

8. **AGREEMENT OF PARTNERS AS TO WAGES FOR QUITTERS—SUPPORT OF FINDING.**—Where the evidence showed an original agreement of seven partners to complete the section and share the profits equally, but also showed that afterward, when one of the partners quit the work and refused to do more, they settled with him on a basis of wages at three dollars per day, less expenses advanced, and it was then agreed between all of the remaining partners, including plaintiff's assignor, that if any other one should quit the work before it was done he should receive the same *per diem*, less expenses, the court properly found, upon sufficient evidence, that the recovery of the plaintiff, as assignee of a quitter of the work before it was done, was limited to the same *per diem*, less such expenses. (Id.)
9. **AGREEMENT NOT REQUIRED TO BE IN WRITING—EVIDENCE.**—The understanding between the partners as to how quitters should be paid was not required to be in writing, and could be determined upon at any time. Evidence as to how the first quitter was settled with was admissible as tending to corroborate the agreement then made between all the remaining partners that the rule adopted in his case was to govern if others should quit the work. (Id.)
10. **AGREEMENT AS TO QUITTERS NOT INEQUITABLE—PROPER SHARES IN PROFITS.**—The agreement as to quitters found by the court was not unreasonable or inequitable. On the contrary, it was but just that the five partners who stood by the contract to construct the section to its completion, and took the risks of loss in the business, should alone share in whatever profits might result from their fidelity to their obligations. (Id.)
11. **CODE SECTION INAPPLICABLE.**—Section 2403 of the Civil Code, providing that, "In the absence of any agreement on the subject, the shares of partners in the profit and loss of the business are equal," is only intended to reach cases in the absence of any agreement between the partners relating to the shares of partners, and does not apply to an equitable agreement between the partners as to the share of quitters in a work undertaken by the partnership. (Id.)

See Community Property, 3, 4; Receiver, 1, 6; Specific Performance, 10.

PLACE OF TRIAL. See Appeal, 1-5; Criminal Law, 2-5.

PLEADING.

1. **INDEBITATUS ASSUMPSIT—MONEY HAD AND RECEIVED—"USE OF PLAINTIFF" NOT AVERRED—EXPRESS PROMISE.**—In pleading a count of a complaint in *indebitatus assumpsit* for money had and received, the omission to aver that the money was received "to the

PLEADING (Continued).

use of the plaintiff" would be fatal were it not that the count alleges a direct promise of the defendant appealing to repay the money, which had the effect to make the count sufficient to state a cause of action. (Rand v. Columbian Realty Co., 444.)

2. DIFFERENT COUNTS BASED ON SAME TRANSACTION—ELECTION NOT REQUIRED.—Where all of the different counts of the complaint were based upon the same transaction, and had reference to the same identical sum of money, the court did not err in refusing to compel the plaintiff to elect between the counts. (Id.)

3. FIRST COUNT BASED ON FRAUD—REPRESENTATIVE AGENCY IN OBTAINING MONEY—PROMISE OF APPELLANT—CAUSE OF ACTION.—Where the first count of the complaint was based on fraud between defendant corporations in obtaining money from plaintiff without consideration, under a contract with the investment company, used as representative agent of the realty company, under fraudulent representations, all of the money having been received by the realty company, which promised to pay the same, and did pay part but refused to pay the residue, such count states a cause of action against the realty company to compel payment of the residue. (Id.)

4. INCONSISTENT FINDINGS—REVERSAL.—A general finding that the allegations made in the first count of the complaint were not sustained is inconsistent with findings in favor of the second count of *indebitatus assumpsit* based upon the same express agreement stated in the first count, which is found to be untrue, and such inconsistency is ground for reversal of a judgment based on the second count. (Id.)

5. SUPPORT OF FINDING UNDER SECOND COUNT—PRESUMPTIVE NATURE OF EXPRESS AGREEMENT—DIRECT INCONSISTENCY.—The support of the finding under the second count of the complaint as to the express agreement, which must be presumed to be based upon sufficient evidence where there is any evidence in the record tending to sustain it, and there appearing to be but one agreement shown in the record, must rest upon the theory that the court determined under the evidence that the money was obtained either fraudulently and through misrepresentation, or by means of some agency or representative of appellant. But this finding so supported is directly and absolutely inconsistent with the finding that no express agreement was made under the first cause of action, which related to the same facts and circumstances surrounding the transaction. (Id.)

See Attorney at Law, 2; Assignment, 6; Contract, 29; Corporation, 1, 2, 14-16; Deed, 2; Ejectment; Eminent Domain, 1-3, 23-26, 30-37; Gas Company, 2-6; Lease, 1; Mechanics' Liens, 7; New Trial, 15; Specific Performance, 1, 2.

PLEDGE. See Corporation, 11.

POLICE POWER. See Criminal Law, 19.

PRACTICE.

1. **GENERAL APPEARANCE OF FOREIGN CORPORATION DEFENDANT—PROCURING STIPULATION AND ORDER EXTENDING TIME TO ANSWER.**—A foreign corporation defendant to an action makes a general appearance by written request by its attorney for a stipulation from plaintiff's attorneys extending time to answer, which was granted, and by procuring through such attorney an order of court, upon affidavit, extending time in which to answer, there being nothing in the request, stipulation, affidavit, or order to indicate that the appearance was intended to be special. (California etc. Lumber Co. v. Superior Court, 65.)
2. **EFFECT OF GENERAL APPEARANCE.**—A general appearance by a defendant waives all question as to the service of process, and is equivalent to personal service. (Id.)
3. **DEFAULT OF DEFENDANT—DUTY OF COURT—ORDER QUASHING SERVICE OF SUMMONS.**—The defendant having appeared and made default, it was the duty of the court to enter the default of the defendant, which duty cannot be excused on the ground that on motion of the defendant, the court ordered the service of the summons to be quashed, the service of summons having been waived by defendant. (Id.)
4. **IMPROPER DEFAULT AND JUDGMENT—VACATION—EXCEPTION TO SURETIES ON ATTACHMENT BOND NOT AN APPEARANCE.**—Where no summons was served upon the defendant, the mere exception by defendant to sureties on an attachment bond cannot constitute an appearance in the action, or authorize the entry of the default of the defendant, or of a judgment by default against him, and the court properly vacated such default and judgment by default, on motion of the defendant, on the ground that the court never acquired jurisdiction of his person. (Salmonson v. Streiffer, 395.)
5. **APPEARANCE, HOW CONSTITUTED.**—Under section 1014 of the Code of Civil Procedure, "A defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." This statute was intended to settle all disputes as to what constitutes an appearance. There can be no chance for argument about equivocal acts not constituting either of those enumerated. (Id.)
6. **EXCEPTION TO SURETIES INVOLVING NO APPEARANCE IN COURT.**—In excepting to the sufficiency of sureties on an attachment bond, the defendant is not required to appear in court. The notice of such exception does not contemplate the appearance of the sureties in court for any purpose. It merely contemplates the duty of the plaintiff to justify, not before the court, but before the judge or

PRACTICE (Continued).

clerk thereof, and in case of failure so to do, the judge or clerk must issue an order vacating the writ of attachment. (Id.)

7. **NOTICE OTHER THAN EXPRESS NOTICE OF APPEARANCE NOT EFFECTIVE AS AN APPEARANCE.**—The giving of any mere notice other than the express notice of appearance provided for in section 1014 of the Code of Civil Procedure cannot be effective to constitute a notice of appearance. (Id.)

See Appeal; Appearance; Attachment; Costs; Evidence; Findings; New Trial; Pleading; Summons.

PRINCIPAL AND AGENT. See Agency.

PROBATE LAW. See Estates of Deceased Persons; Wills.

PROHIBITION. See Elections, 10; Estates of Deceased Persons, 1; Juvenile Court, 1, 9.

PROMISSORY NOTE.

1. **ACTION ON NOTE—CONSIDERATION—MONEY ADVANCED TO PAY UP STOCK PURCHASED ON MARGIN—COLLATERAL SECURITY—CONTRACT NOT INVALID.**—Where a note sued upon was in consideration of money advanced by plaintiff to enable defendant to pay up stock originally purchased by defendant from a broker upon margin, which was so paid up and transferred to plaintiff to secure the note, the contract as between the plaintiff and defendant was not invalid, as being prohibited by statute, and cannot be regarded as a gambling contract. (Foster v. De Zart, 52.)
2. **MONEY ADVANCED IN GOOD FAITH—RECOVERY NOT DEFEATED BY KNOWLEDGE OF ORIGINAL MARGINAL CONTRACT.**—Plaintiff having in good faith advanced to defendant money with which to complete the contract for the purchase of the stock, recovery of such advancement could not be defeated simply because plaintiff had a general knowledge of the marginal character of the contract as between the defendant and the broker, where there is nothing in the record indicating any irregularity or invalidity of the contract entered into between plaintiff and defendant. (Id.)
3. **NOTE PAYABLE ON DEMAND—EVIDENCE—WAIVING DEMAND BEFORE SUIT.**—Where the note was payable on demand, and, in addition to the evidence of plaintiff that he demanded payment before suit, there is evidence in the record tending to show that before suit defendant refused payment of the note and demanded a return of the stock with the money he had paid on it, such action on the part of the defendant was a waiver of any demand, which is not required when it appears that it would have been unavailing. (Id.)

PROMISSORY NOTE (Continued).

4. **ASSIGNMENT AND REASSIGNMENT OF NOTE.**—It is held that an assignment of the note to a third party by the plaintiff, and a reassignment thereof to the plaintiff before suit, were each regularly made; and that it is sufficient to support the action that plaintiff was the owner and holder of the note when it was commenced. (Id.)
5. **ALLOWANCE OF INTEREST.**—It is held that there was no error in the allowance of interest on the demand note and on a balance due thereon. (Id.)

PROSTITUTION. See Criminal Law, 250–252.

PROTECTION DISTRICT.

1. **PETITION FOR FORMATION—SIGNATURES OF PROPERTY OWNERS—PRESUMPTION—BURDEN UPON PETITIONER FOR WRIT OF REVIEW.**—Upon a petition for a writ of review to annul a proceeding for the formation of a protection district under the act of March 27, 1895, for the improvement and rectification of the channels of innavigable streams, it must be presumed that, when the petition for the formation of the district was filed, the board of supervisors required and received evidence as to the genuineness of the signatures thereto, and that the signers were “property holders of the district”; and the burden is upon the petitioner for the writ of review to overcome the presumption that the supervisors performed their duty in that regard, and to overcome their finding to that effect, and to show that the board of supervisors had no jurisdiction to form the district; and that presumption and finding must prevail, in the absence of any evidence to the contrary. (Barnes v. Board of Supervisors of Colusa County, 760.)
2. **ORDER OF PROCEEDING UNDER STATUTE.**—To require proof as to the signatures of property owners before the board passes a resolution of intention to organize the district is the natural order of procedure contemplated by the statute; and no reason appears why such evidence should be repeated at the time of hearing of objections of the property owners, if any, to such work or improvement, where no issue as to the number of property owners signing the petition is raised at that time. (Id.)
3. **OBJECTIONS TO WORK OR IMPROVEMENT OR EXTENT OF DISTRICT—HEARING BY BOARD.**—Under section 3 of the statute, “Any person interested objecting to such work or improvement, or to the extent of the district of lands to be affected or benefited by such work or improvement, and to be assessed to pay the costs and expenses thereof, may make written objections to the same within ten days after the expiration of the time of the publication of said notice,” and thereafter such objection shall be heard by said board. (Id.)
4. **OBJECTIONS BY PETITIONER FOR WRIT OF REVIEW—ADVERSE FINDING BY BOARD.**—Where the petitioner for the writ of review specified his

PROTECTION DISTRICT (Continued).

objections to such improvement and to the extent of the district, on the ground that the work as contemplated would injure his lands, specifying in what respect, and that the formation of the district would burden the taxpayers, and evidence was heard as to the objections specified, and the finding was against the petitioner, the board was not required at that time to do anything more, assuming that its prior proceedings were regular. (Id.)

5. **PROOF OF PUBLICATION OF NOTICE—ADJUDICATION BY BOARD—ORDER ESTABLISHING DISTRICT—SUBSEQUENT FILING OF AFFIDAVIT IMMATERIAL.**—Where the record of the board of supervisors containing the order establishing the district shows that it was adjudicated that the notice was published as required by law, and its finding is not disputed, the subsequent filing of an affidavit of publication is of no consequence, as it is merely additional evidence which does not prove, nor tend to prove, that the board did not have sufficient and proper evidence before them as to the publication of notice when the order was made. (Id.)
6. **ANSWER TO OBJECTION OF PETITIONER FOR WRIT OF REVIEW.**—It is held a sufficient answer to an objection to the proof of publication by the petitioner for the writ of review that the statute does not require the filing of an affidavit of publication before the order is made, although this would be the usual course, that the publication was actually made as required, that the hearing was had at the proper time, and that such petitioner had actual notice and was present with his objections at the appointed time, and was duly heard by the board before the order was made establishing the district. (Id.)
7. **POWER OF SUPERVISORS TO CHANGE BOUNDARIES OF DISTRICT.**—The supervisors have power to change the boundaries of the district to make them more definite and certain than in the petition and resolution of intention, or to conform them to the needs of the district. (Id.)
8. **PROTECTION DISTRICT ACT CONSTITUTIONAL—POWER OF ASSESSMENT NOT DELEGATED—REPORT OF COMMISSIONERS—HEARING UPON NOTICE.**—The act for the formation of protection districts is constitutional and valid. The supervisors are not thereby deprived of the power to levy and fix the amount of the assessment on the lands within the district. That power is not improperly delegated to the commissioners appointed to view the land, make estimates and report their investigations to the board, which sets the same for hearing upon notice and determines the assessment, being limited only as to the proportion imposed upon the county. (Id.)
9. **DOUBLE TAXATION NOT INVOLVED.**—The act does not involve double taxation. The tax is for the public improvement within a certain district of especial benefit to the lands therein, but incidentally of

PROTECTION DISTRICT (Continued).

benefit to the county at large. The land owners cannot complain that part of the tax is assessed to the county; and the general scheme involves the same principle as is found in the reclamation and irrigation district legislation which has been upheld by the higher courts. (Id.)

10. **DE FACTO CORPORATION—VALIDITY ONLY ASSAILABLE IN QUO WARRANTO.**—The rule that a *de facto* corporation cannot be questioned as to its validity by private individuals, but only in *quo warranto* at suit of the state, applies to a *de facto* protection district. (Id.)
11. **WRIT OF REVIEW NOT SUSTAINABLE.**—It is held that the writ of review is not sustainable on the merits, whether the protection district was a corporation *de jure* or *de facto*, and that, in either case, the petition for the writ must be denied. (Id.)

PUBLIC SCHOOLS. See Schools.

QUANTUM MERUIT. See Contract, 22.

QUIETING TITLE.

1. **ACTION TO QUIET TITLE—POSSESSION OF DEFENDANT—DEFENSE OF TAX TITLE—BURDEN OF PROOF.**—Where the complaint in an action to quiet title alleged ownership and right of possession of the lots in controversy, and possession by the defendant, who took issue on plaintiff's ownership, and set up a tax title in himself acquired from the state, the burden of proof is upon the plaintiff to show title in himself, to overcome the possession of the defendant; and if he fails in such proof, it is not necessary to inquire into his objections to defendant's tax title, for if he has no title, he could not disturb defendant's possession, and it was not his business as to whether or not defendant's paper title was perfect. (House v. Ponce, 279.)
2. **TITLE ASSERTED UNDER QUITCLAIM DEED—BONA FIDE PURCHASE NOT SHOWN—WANT OF CONSIDERATION—ABSENCE OF TITLE—PRIOR DEEDS.**—Where the evidence of title in plaintiff was by virtue of a quitclaim deed of the lots to his predecessor from one who owned the lots at the time of the assessment for taxes and sale to the state, and there was no evidence that plaintiff paid any value for the transfer to him, but it was proved that no consideration was paid for the quitclaim deed, and that the grantor prior thereto had sold and conveyed all the lots to third persons, the evidence shows the absence of the title asserted by the plaintiff. (Id.)
3. **EFFECT OF PRIOR DEEDS—RECORD NOT SHOWN.**—The prior deeds by the grantor of the quitclaim deed, though not shown to have been recorded, were good and passed title as to all persons, save a subsequent purchaser or mortgagee in good faith, and for a valuable consideration. (Id.)

QUIETING TITLE (Continued).

4. **EFFECT OF QUITCLAIM DEED—NOTICE TO GRANTEE—ASSUMPTION OF RISK OF TITLE.**—The fact that the grantor refused to make any other deed than a quitclaim was notice to the grantee sufficient to put him on inquiry as to the grantor's title. In the absence of such inquiry, he assumed all risks as to title, and knew that he was taking only such title as might be left in the grantor. If, in fact, no title was left in him to convey, none was conveyed. (Id.)
5. **INEQUITABLE PURPOSE OF PROCURING QUITCLAIM TITLE—ASSAULT UPON TAX TITLE.**—If plaintiff procured the quitclaim title for the purpose of acquiring a standing upon which to come into court and attack defendant's tax title, such purpose does not commend itself to a court of equity. The defendant being in possession under a deed from the state, regular in form, for which he paid a valuable consideration, and thus enabled the state and county to collect the taxes, which had been assessed upon the lots, cannot be disturbed for light or trivial reasons, or by a stranger who had nothing but a quitclaim from one who had no title. (Id.)
6. **AIM OF LAW—UNJUST CLAIM NOT ENFORCED.**—The law aims to do justice and prevent wrongs, and will not grant affirmative aid to one who proves no title to relief and relies upon a mere piece of paper made without consideration by one having no title. (Id.)
7. **EVIDENCE SHOWING WANT OF TITLE—TESTIMONY OF GRANTOR OF QUITCLAIM DEED—DECLARATIONS IMPEACHING TITLE NOT INVOLVED.** The testimony of the grantor of the quitclaim deed was properly admitted to show that he sold and conveyed all the lots he owned prior to the quitclaim deed, and that at that time he had no lots, and conveyed nothing when he made the quitclaim deed. Such evidence does not involve any declarations tending to impeach the title conveyed. (Id.)

See New Trial, 2; Remainders, 17, 18, 30, 33.

RAILROADS. See Negligence, 1-6.

RAPE. See Criminal Law, 264-310.

RECEIVER.

1. **ACTION FOR ACCOUNTING AND DISSOLUTION OF PARTNERSHIP—APPOINTMENT OF RECEIVER—DISCRETION—REVIEW UPON APPEAL.**—The power to appoint a receiver in an action for an accounting and dissolution of an alleged partnership is one of sound judicial discretion; and unless it can be said that there appears from the record here a clear abuse of such discretion in the action of the court below in making the order appealed from, the same must stand. (Whitley v. Bradley, 720.)
2. **EQUITABLE RELIEF BY RECEIVER WHEN INVOKED.**—Equitable relief by way of the appointment of a receiver will be invoked only when

RECEIVER (Continued).

the exigencies of the case clearly appear to absolutely require it for the conservation of the rights of all the parties concerned in the litigation giving rise to the application for such relief. (Id.)

3. EXTRAORDINARY REMEDY—SHOWING REQUIRED FOR APPOINTMENT.—

The appointment of a receiver is justly regarded as an extraordinary or harsh remedy; and a court of equity will never exercise its discretion favorably to a motion invoking the aid of this remedy, except upon a clear showing that such relief is necessary in order to preserve and fully protect the rights of all parties. (Id.)

4. PROBABLE RIGHT IN PROPERTY—DANGER OF LOSS.—

It must be made to appear that the person seeking the appointment of a receiver has at least a probable right or interest in the property or fund involved in the litigation, and that there is danger of its being lost or destroyed or misappropriated, unless a receiver be appointed *pendente lite*. (Id.)

5. FINDING UPON CONFLICTING TESTIMONY—ABUSE OF DISCRETION NOT SHOWN.—

Where, upon conflicting testimony, the right or interest and the danger of the destruction or misappropriation of the property or fund is found to exist, a reviewing court, as a general rule, is in no position to say that the *nisi prius* court has abused its discretion in the appointment of a receiver. (Id.)

6. FORMATION OF PARTNERSHIP PRIOR TO INCORPORATION—PARTNERSHIP BUSINESS NOT TRANSFERRED TO CORPORATION—RECEIVER NOT DISTURBED.—

Though the parties forming a partnership contemplated the formation of a corporation which was in fact formed, but it appears that the partnership business never was transferred to the corporation, it does not affirmatively appear, on account of the mere formation of such corporation, that the court abused its discretion in the appointment of a receiver of the partnership business. It is sufficient that there is some showing that it was the original intention and agreement of the parties to form a partnership, and that they actually formed and carried on the business through that instrumentality, and that the showing is of such a character as to make it impossible for this court to reverse the order appealed from without an unwarranted interference with the discretion vested in the trial court. (Id.)

7. EX PARTE APPOINTMENT—FAILURE TO REQUIRE BOND TO DEFENDANT—VOID APPOINTMENT.—

Where the appointment of a receiver was *ex parte*, and the court failed to require the bond made essential by section 566 of the Code of Civil Procedure, as amended in 1907, the noncompliance therewith rendered the appointment void. (Davila v. Heath, 370.)

8. AMENDMENT MANDATORY.—

The effect of the amendment was intended to take all discretion from the court, and to make the requirement of the bond mandatory. (Id.)

RECEIVER (Continued).

- 9. RIGHT OF APPEAL—ISSUES UNDER PLEADINGS TO BE TRIED.**—The appellant was a party aggrieved by the order, and had the right to appeal therefrom. The fact that the answer takes issue upon the complaint, and pleads agency for the intervenor, cannot be considered. The issues may be found for the plaintiff, and can only be determined after trial. Neither the truthfulness of the complaint nor answer can be assumed to deprive plaintiff of the right of appeal. (Id.)

See Appeal, 8, 9.

REMAINDER.

- 1. EMINENT DOMAIN—MONEY IN COURT—SETTLEMENT OF INTERESTS—PROTECTION OF UNBORN GRANDCHILDREN.**—In this proceeding in eminent domain it is held that the court properly settled the rights of conflicting claimants to the property out of the money paid into court, and subjected the rights of the appellants to the rights of unborn grandchildren to an alternative contingent remainder in the property. (County of Los Angeles v. Winans, 234.)
- 2. CONVEYANCE OF ESTATE FOR LIFE—REMAINDER TO HEIRS OF BODY—PURCHASE.**—When property in this state is conveyed to a mother for life, with remainder to the heirs of her body, those interested in the remainder take by purchase and not by inheritance. (Id.)
- 3. CONTINGENT FUTURE INTEREST.**—Such remainder is a contingent interest, future in character, and the person to whom and the time of the happening of the event upon which it is limited to take effect, were both uncertain at the time of its creation. (Id.)
- 4. CONTINGENT REMAINDER NOT VESTED.**—Since the uncertainties at the time of the creation of the contingent remainder continue to exist until the death of the life tenant, it did not and could not vest until her death, because she could have no "heirs of her body" prior to her decease. In the interval, all of her children may die, and the entire estate might vest wholly in her unborn grandchildren. (Id.)
- 5. INTERESTS OF UNBORN GRANDCHILDREN NOT VOID FOR UNCERTAINTY, NOR MERE POSSIBILITIES.**—The interests of unborn grandchildren in the contingent remainder are not void because of the improbability of the contingency on which they are limited to take effect; nor can such interests be regarded as mere possibilities, such as the expectancy of an heir apparent, as they do not depend upon the law of succession to determine whether or not they will take effect, and they cannot be defeated by the testamentary or other act of the ancestor. (Id.)
- 6. CODE SECTION AS TO VESTED FUTURE INTERESTS INAPPLICABLE.**—Section 694 of the Civil Code relating to a vested future interest "in a living person" has no application to a future contingent remainder in unborn grandchildren. (Id.)

REMAINDER (Continued).

7. **DISTINCTION BETWEEN VESTED AND CONTINGENT REMAINDERS.**—Where the preceding estate is limited to depend on a certain event which must happen, and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may determine prior to the expiration of the estate in remainder, the remainder is vested; but where the preceding estate is to determine upon an event which may never happen, or where the remainder is limited to a person not *in esse*, nor ascertained, or requires the concurrence of a dubious, uncertain event, independent of preceding estates, to give it a capacity of taking effect, the remainder is contingent. (Id.)
8. **ALTERNATIVE CONTINGENT REMAINDER.**—The future contingent remainder in unborn grandchildren is an “alternative contingent remainder,” under section 696 of the Civil Code. Such contingent remainder will vest in the unborn grandchildren whose father or mother, the child of the life tenant, fail to survive her decease. In that case, the grandchildren become the alternative substitutes for the deceased children of the life tenant, in taking the same vested fee in remainder which would otherwise have vested in her children. The taking of the unborn children is not a contingency dependent on a contingency, nor a subsequent contingency, but it is the same contingency which may happen, at the same time, in more than one way. (Id.)
9. **VIRTUAL REPRESENTATION OF UNBORN GRANDCHILDREN.**—The conclusion that the rights of unborn grandchildren are contingent and not vested does not preclude the application to them of the principle of virtual representation, if the proceeding in which such representation was exercised was such as to justify it. (Id.)
10. **NECESSARY RULE OF REPRESENTATION OF UNBORN REMAINDERMEN — PROTECTION IN PROCEEDS OF SALE.**—When an estate in persons living is subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, not only for themselves, but also for the persons unborn, as a necessary rule. The rights of persons unborn are sufficiently cared for if, when the estate is sold under a valid judgment, the proceeds take its place, and are secured in some way for such persons. (Id.)
11. **VIRTUAL REPRESENTATION CONFINED TO MATTER OF NECESSITY.**—The better rule is that virtual representation of unborn persons can be applied in support of a judgment only as a matter of necessity. The necessity of relying thereupon to acquire jurisdiction of the estate of unborn persons is apparent when the estate is sold and the proceeds take its place, and are so secured as to

REMAINDER (Continued).

include the caring for and preserving the rights of the persons so represented. (Id.)

12. **VIRTUAL REPRESENTATION LIMITED BY GOOD FAITH.**—The rule of virtual representation is confined to cases where the representation is in good faith, so that what is done by the representation is all that the represented person could do if personally present. The interests of representative and represented must be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each. If the sole purpose of the living person interested is to secure some advantage for himself, or to serve the convenience of one whose title is being quieted against the unborn remaindermen, virtual representation could not be permitted to exist. (Id.)
13. **PROTECTION OF PERSON REPRESENTED AGAINST FRAUD.**—The protection of a person brought into court by representation which is fraudulent is to be found in his right when he becomes capable of suing in his own right to attack the decree on the ground of fraud and collusion in its procurement. (Id.)
14. **STATUTORY REPRESENTATION IN FORECLOSING LIENS OF STREET ASSESSMENTS.**—The street improvement act of 1885, under which the land was sold under foreclosure of liens of street assessments, recognizes a constructive or virtual representation of unborn persons who have contingent rights in the property, by contemplating that the decree of foreclosure and sale shall subject the entire title to the property charged with the lien. All interests therein are constructively before the court when the service is made according to the statute. (Id.)
15. **FORECLOSURE PROCEEDING NOT IN REM—VIRTUAL REPRESENTATION NOT PRECLUDED.**—The action to foreclose the lien of the street assessment is not *in rem*. If it were, there would be no need of any principle of representation. The fact that the judgment will not bind the entire world does not prevent the application of the doctrine of virtual or constructive representation contemplated by the statute. (Id.)
16. **ACQUISITION OF INTERESTS OF UNBORN GRANDCHILDREN PREVENTED—TRUST AGREEMENT FOR "HEIRS OF BODY."**—The acquiring of jurisdiction of the interests of the unborn grandchildren in the action to foreclose the assessment did not effectually vest those interests in the purchasers at the sales, where respective agreements made by them with the life tenant and with each other were merged in a declaration of trust for the benefit of herself "and the heirs of her body." (Id.)
17. **ACTIONS TO QUIET TITLE—VIRTUAL REPRESENTATION PRECLUDED—PRIOR CONVEYANCE BY LIFE TENANT AND DAUGHTER.**—Where before the commencement of actions to quiet title, the life tenant and her

REMAINDER (Continued).

daughter had conveyed their interests to a predecessor of the plaintiff, their interests became hostile to that of other "heirs of her body," and neither she nor the daughter nor the plaintiff could represent the unborn grandchildren in actions to quiet title as against the other "heirs of her body," for the purpose of shutting off all other interests. (Id.)

18. **PARTIES TO ACTION TO QUIET TITLE—"ADVERSE CLAIMANTS."**—Under section 738 of the Code of Civil Procedure, the action to determine adverse claims must make the "adverse claimants" parties to the action, whether the service be personal or by publication, and where the virtual representation of unborn remaindermen is precluded, such unborn persons not parties to the action cannot be bound by the decree therein. (Id.)
19. **LEASE BY LIFE TENANT—BUILDING BY LESSEE—FORECLOSURE OF MECHANICS' LIENS—ABSENCE OF REPRESENTATION.**—The life tenant having the possession of the property was authorized to lease the same so as to bind her interest, and where the lessee contracted to improve the property, the unborn grandchildren were not so connected with the lease as to be affected by the foreclosure of a mechanic's lien against the property. The life tenant could not ask a court of equity to preserve her interest at their expense. (Id.)
20. **GUARDIANSHIP OF MINOR BY HUSBAND—POWER LIMITED BY ORDER OF COURT.**—Where the husband was appointed as guardian of the minor children by the probate court, he had no power to bind their interests by contract or by mechanics' liens, without an order of the court. (Id.)
21. **JUDGMENT FORECLOSING LIENS NOT INVOLVING REPRESENTATION—INTERESTS NOT IDENTICAL.**—The judgment foreclosing the mechanics' liens could not affect the interests of unborn grandchildren where there is nothing in its language to comprehend them, and it does not appear that any interests foreclosed were identical with their interests so as to permit of virtual representation. (Id.)
22. **CONSENT OF MINORS TO DECREE NOT BINDING GRANDCHILDREN.**—Where the minors were not held bound as owners of the property, but solely as having consented through their guardian to the decree, such consent could not bind the unborn grandchildren. (Id.)
23. **ACTION BY PURCHASER AT SALE TO QUIET TITLE—ABSENCE OF REPRESENTATION.**—There being no transfer of the interests of the unborn grandchildren to the purchaser at the sale, in an action by him to quiet title against the husband and children, he having already acquired their interests in the property, he cannot represent the interests of the grandchildren therein. (Id.)
24. **COLLUSIVE SALE UNDER STREET SEWER ASSESSMENT—QUESTION OF FACT.**—A sale under a street sewer assessment which the court

REMAINDER (Continued).

found upon sufficient evidence was a collusive one to cure a defect in the title of one of the appellants, and initiate an adverse claim in favor of his wife, must be disregarded, the question being one of fact for the court. (Id.)

25. **CONVEYANCE OF ESTATE FOR LIFE—REMAINDER TO HEIRS OF BODY—PURCHASE—INHERITANCE—INCONSISTENT CLAIMS.**—Where a conveyance was made to a mother for life, with remainder to the "heirs of her body," the proper contention that such heirs took by purchase, under section 779 of the Civil Code, is inconsistent with the improper contention that the living children have the expectancy of "heirs apparent." (County of Los Angeles v. Winans, 257.)
26. **RIGHTS OF LIVING CHILDREN.**—The rights of the remaindermen who are living children are not mere possibilities under section 700 of the Civil Code, but are future estates in fee to vest in such of them as may survive their mother. (Id.)
27. **CHARACTERISTICS OF FUTURE INTERESTS.**—Future interests pass by succession, will and transfer, in the same manner as present interests, and they are not rendered void because of the improbability of the contingency upon which they are limited to take effect. (Id.)
28. **CONSTRUCTION OF WORDS "HEIRS OF HER BODY."**—To construe the words "heirs of her body" to mean "in the capacity of heirs" would be to restore the rule in Shelley's Case, and repeal by construction the express terms of section 779 of the Civil Code. For all the purposes connected with the transactions involved in this case those words will be construed as words of description and identity, and not of capacity. (Id.)
29. **FORECLOSURE OF STREET ASSESSMENT LIENS—SUBJECTION OF ENTIRE PROPERTY—TRUST AGREEMENT.**—The foreclosure of street assessment liens under the statute in force had the effect to subject the entire property and all interests therein to sale to satisfy the liens; the acquisition of full title thereunder being only prevented by a trust agreement between the purchasers and the appellants. (Id.)
30. **ACTIONS TO QUIET TITLE—APPELLANTS CONCLUDED BY DECREES.**—*Held*, that in the actions to quiet title brought against the appellants as parties defendant, their rights were concluded by the decrees rendered therein against them. (Id.)
31. **ASSIGNMENTS OF INTERESTS BY APPELLANTS—CLAIM OF MORTGAGES CONCLUDED BY FINDING.**—It is held the claim of appellants that the assignments of their interests were intended as mortgages is concluded against them by the finding in an action to quiet title against them. (Id.)
32. **TRUST BY OPERATION OF LAW—ADVERSE HOLDING BY TRUSTEE—RIGHT OF TRUSTEE TO QUIET TITLE—BENEFICIARIES CONCLUDED.**—

REMAINDER (Continued).

When a trust arises solely by operation of law, the holding by the trustee is adverse from its inception; and the trustee is not thereby precluded from maintaining an action to quiet his legal title against the beneficiaries. Such beneficiaries may set up their equitable rights; and where all of them appeared as defendants, they are concluded by the findings against them upon all issues joined in their behalf. (Id.)

33. TITLE UNDER FORECLOSURE OF MECHANICS' LIENS—DECREE QUIETING TITLE—APPELLANTS ESTOPPED.—*Held*, that as to the title acquired under foreclosure of mechanics' liens, if appellants are not precluded from a collateral attack upon the decree of foreclosure, they are estopped by the findings and decree against them brought by the purchaser of the title to quiet his title against them. (Id.)

34. EMINENT DOMAIN—SUPPORT OF FINDING—DESCRIPTION OF PROPERTY—CLAIM OF "GORE"—MISASSUMPTION OF FACT BY SURVEYOR.—Upon appeal from a judgment in eminent domain settling interests in the property out of the fund in court, it is held that a finding that the property rights of appellants passed to other parties is sustained as to the description thereof by the evidence, and that the testimony of a surveyor that a small "gore" was not lost to appellants is based upon a misassumption of fact as to the description. (Id.)

35. CONSISTENCY OF FINDINGS—"CONTINGENT" AND "VESTED" INTERESTS.—Where the findings construed as a whole clearly show that any remainder under the deed to the life tenant was contingent and could not be ascertained until her death, a finding that a respondent "is the owner of the estate in remainder" in a lot "that was vested in" the children appellants by virtue of the deed, is not to be construed as inconsistent with the other findings, where the context clearly shows that the words "vested in" are used as the equivalent of the words "acquired by," so that such finding imports that respondent is the owner of the estate in remainder acquired by such children by virtue of the deed. (Id.)

36. EVIDENCE—ABSENCE OF PREJUDICIAL ERROR.—It is held that there is no prejudicial error in the admission of evidence. (Id.)

RECLAMATION DISTRICT.

1. DE JURE CORPORATION NOT SHOWN—INSUFFICIENT PUBLICATION.—

Where the affidavit of publication of a petition for the formation of a reclamation district shows that the publication of notice of the hearing was insufficient to justify the hearing of the petition, it is insufficient to show a reclamation district *de jure*. (Reclamation District No. 765 v. McPhee, 382.)

2. FORECLOSURE OF ASSESSMENT LIEN—DE FACTO CORPORATION—VALIDITY NOT COLLATERALLY ASSAILABLE.—In an action by a recla-

RECLAMATION DISTRICT (Continued).

- mation district to foreclose the lien of an assessment, where the district *de facto* is established, its existence cannot be collaterally assailed. (Id.)
3. **NATURE OF CORPORATION DE FACTO.**—A corporation *de facto* exists where a number of persons have organized and acted as such corporation, have conducted their affairs to some extent through the officers usually employed by corporations, and have assumed the appearance of a legal corporate body. (Id.)
 4. **EVIDENCE RECEIVED WITHOUT OBJECTION.**—No objection having been made to evidence tending to prove a *de facto* corporation, upon the ground that it was not within the issues, it may be considered under the averments denied. (Id.)
 5. **LAPSE OF TIME IMMATERIAL.**—It is not necessary that some particular period of time should elapse in order to show the *de facto* existence of a corporation. Such existence depends rather upon what has been done under and by virtue of the organization than upon the length of time that may elapse after its inception. (Id.)
 6. **DE FACTO ORGANIZATION BASED ON DISTINCT GROUNDS.**—*De facto* organizations are upheld on distinct grounds from those on which a *de jure* organization rests. (Id.)
 7. **RIGHT OF DE FACTO CORPORATION TO EXIST—RIGHT DETERMINABLE ONLY IN QUO WARRANTO.**—Where the right of a *de facto* corporation to exist is shown, its right to exist can be determined only upon *quo warranto* proceedings. (Id.)
 8. **POWER OF CORPORATION DE FACTO.**—A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the permanent authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even against the state, except in proceedings to arrest its usurpation of power, its acts are to be treated as efficacious. (Id.)
 9. **RECLAMATION DISTRICTS DE FACTO—VALIDITY OF ASSESSMENT.**—Reclamation districts, authorized under the Wright act, are public corporations, whether *de jure* or *de facto*. That is a matter which cannot be inquired into collaterally; and the validity of the lien of an assessment thereof in no way rests upon the *de jure* character of the reclamation district. (Id.)

ROBBERY. See Criminal Law, 253-263.

SALE.

1. **ACTION FOR SALE OF STOCK—REFORMATION OF AGREEMENT TO SHOW SALE—SUPPORT OF FINDINGS.**—*Held*, that the nature of the contract sued upon was for the sale of stock; that the contract was

SALE (Continued).

properly reformed to show a sale; that the charge conformed to evidence of what the parties meant by the contract; and that the findings of a sale are supported by the evidence. (*Sheakley v. Nelson*, 379.)

2. **SALE OF ASPHALT IN BOXES—PLEADING—COUNTS—EXPRESS PROMISE—REASONABLE VALUE—DEBT—CONSISTENT FINDINGS—SURPLUSAGE.**—In an action for the sale of one hundred and eighty-eight boxes of asphalt mixture by plaintiff to defendant, where the first count of the complaint was upon an express promise to pay therefor \$2.25 per box, amounting to \$423, and the second count was for the reasonable value of the material and labor done in their preparation at the same price and amount, and the third count was in debt for the same amount, findings in favor of plaintiff upon all three counts were not in conflict so as to warrant a reversal; but the finding upon the first count is sufficient to support the judgment, and the other findings, not being in conflict therewith, may be treated as surplusage. (*Barber Asphalt Paving Co. v. Santa Barbara Ice Co.*, 597.)
3. **PROMISE TO PAY FIXED SUM—LIABILITY NOT AVOIDED BY MODE OF FIXING VALUE.**—If one promises to pay a fixed sum for articles furnished him by another, he cannot avoid liability, in the absence of fraud or misrepresentation, because it may appear that the articles were not worth, in a crude state, the sum agreed to be paid, but were only of such value with the labor of putting them in position. (*Id.*)
4. **SUPPORT OF FINDINGS.**—Where there was some evidence which warranted the court in finding that the goods were furnished at the request of the defendant, under a promise to pay therefor a fixed sum, this court cannot disturb such findings. (*Id.*)
5. **CONTRACT TO FURNISH SALT ONE YEAR AT FIXED PRICE—OPTION TO RENEW—NOTICE AFTER YEAR INEFFECTIVE—REASONABLE VALUE.**—Under a contract by which plaintiff agreed to furnish salt to defendant for one year at a fixed price, with the option to defendant to renew the contract for another year at the same rate, where the exercise of such option was delayed until thirty days after the expiration of the year, its exercise at that time was not effective; and notwithstanding such notice then given, plaintiff may recover the reasonable value of all salt thereafter furnished by plaintiff to defendant at its request, without regard to the original contract rate. (*San Pedro Salt Co. v. Hauser Packing Co.*, 1.)
6. **TIME FOR OPTION TO RENEW NOT STIPULATED.**—Where a contract of the expiration of the contract. (*Id.*)
giving notice of such renewal cannot be extended beyond the date provides for its renewal at the option of a party thereto, without fixing the time when such option shall be exercised, the time for

SALE (Continued).

7. **RIGHTS CEASING WITH CONTRACT.**—The right to renew, like other rights, must necessarily cease when there is no longer a contract under and by virtue of which to claim the privilege. (Id.)
8. **INVOICES OF SALT AT INCREASED PRICE—DISCLAIMER OF RENEWAL.** Where all of the invoices of salt furnished by plaintiff to defendant after the expiration of the year, showed shipment at a greater price than that stipulated under the contract, they show that the plaintiff at all times disclaimed any renewal by defendant of the contract, and afford ample evidence to defendant that plaintiff was furnishing salt only at the increased price. (Id.)
9. **SALE OF PRUNE ORCHARD—CONSTRUCTION OF CONTRACT—PRICE PER TON, "ORCHARD RUN" — WARRANTY — "TEST ACCEPTED AT 53."**—A contract by plaintiff to sell to the defendant all of the prunes in plaintiff's orchard at \$95 per ton, "Orchard Run," imports that all the prunes in the orchard were sold at that price, without any reference to size or grading. Where the only warranty in the contract is that the prunes shall be of "good, merchantable quality, well dried," the words written at the foot of the contract, "Test accepted at 53," merely mean that the prunes have been tested, and that the result of the test was fifty-three prunes to the pound, and do not import any warranty that they shall be of that number to the pound. (Ross v. Frank, 88.)
10. **EVIDENCE ADMITTED TO EXPLAIN CONTRACT—CONSTRUCTION CONFIRMED.**—It is held that evidence admitted by the trial court to show the circumstances under which the contract was made, and the oral conversations leading up to it, serves to confirm the construction given by this court to the terms of the contract. (Id.)
11. **SALE OF PRUNE CROP—DELIVERY—EXTENDED TIME—TENDER AND RE-
SALE OF REJECTED PART DURING EXTENSION—GENERAL DEMUR-
RER TO COMPLAINT.**—A complaint setting forth a written contract for the sale of the whole of a prune crop, to be delivered at an agreed price before a specified date, and an extension of time for performance, and the acceptance of the larger part, and the rejection of a specified number of pounds tendered during such extension, is not subject to a general demurrer on the ground that such rejected portion of the crop was sold upon notice before the expiration of such extended time. (Morrell v. San Tomas etc. Packing Co., 305.)
12. **RIGHTS UNDER EXTENDED TIME.**—The extension of time pleaded was to give plaintiff further time to perform; and when plaintiff, within that time, offered to perform, the defendants were bound to accept, if in other respects the offer was in accordance with the contract. Upon defendants' refusal to accept the tendered fruit, the plaintiff was justified in reselling the same. (Id.)

SALE (Continued).

13. **SPECIAL DEMURRER TO COMPLAINT—PRICE OR VALUE OF REJECTED PRUNES NOT SHOWN—UNCERTAIN ASCERTAINMENT OF DEFICIENCY.** The court erred in overruling a special demurrer to the complaint for ambiguity and uncertainty, in that it does not show the price or value of the rejected prunes, and that it cannot be ascertained with certainty how the alleged deficiency on resale was determined. (Id.)
14. **STATEMENT OF DAMAGES FOR BREACH NOT SHOWN.**—The complaint is further uncertain in that it does not contain or show any damages arising to the plaintiff from defendant's breach of the contract, in rejecting the last tender of the residue of the prunes contracted for. (Id.)
15. **VARIATION FROM BASIS PRICE ACCORDING TO SIZE—UNCERTAINTY AS TO SIZE.**—Where it appears that a basis price per pound was agreed, with an agreed variation therefrom by increase or diminution according to size, the complaint was also uncertain in not showing the size of the rejected prunes, as bearing upon the agreed price or value thereof. (Id.)
16. **MEASURE OF DAMAGES FOR BREACH OF BUYER'S AGREEMENT IN CASE OF RESALE—UNCERTAINTY AS TO DIFFERENCE.**—Under section 3311 of the Civil Code, the detriment caused by the breach of a buyer's agreement to accept and pay for personal property, if it has been resold under section 3049, is "the excess, if any, of the amount due from the buyer over the net proceeds of resale." Though plaintiff probably intended to bring the complaint within this section, yet he has failed to show with certainty, or at all, that the "deficiency" referred to is the difference between the contract price of the rejected prunes and the amount for which they were resold, or to give any data from which such difference can be determined. (Id.)
17. **INSUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT FOR LOSS ON RESALE.**—Where the same uncertainty and insufficiency which appears in the complaint, as to the price or value or size of the rejected prunes, or as to the difference on resale, appears in the evidence, a verdict for the amount of the alleged deficiency on resale of the rejected prunes is unsupported by the evidence. (Id.)
18. **VARIANCE BETWEEN AVERMENT AND PROOF.**—Where the complaint alleges that the price of the entire prune crop was \$6,004.37, and the evidence shows without conflict that defendant paid plaintiff \$6,455.71 for the accepted prunes, it appears that plaintiff has been paid more than was due him for the entire crop. If the allegation of the complaint was a mistake, as suggested by plaintiff, as a witness, he made no effort to correct it. (Id.)
19. **EVIDENCE—MEANING OF CONTRACT—"MORRELL RANCH"—LEASES BY PLAINTIFF—QUANTITY OF PRUNES.**—Where the contract called for the entire crop of prunes estimated at 100 tons grown and

SALE (Continued).

dried on the orchard known as the "Morrell ranch," evidence was admissible to show that the plaintiff "Morrell" was in fact working under leases three ranches, and that the contract contemplated the whole prune crop grown by "Morrell" under his three leases, which was in fact less than the estimated quantity. (Id.)

20. AMBIGUITY IN CONTRACT—ORAL EVIDENCE TO IDENTIFY SUBJECT.—There was such an ambiguity in the contract as to authorize oral evidence to identify the subject of the contract. (Id.)

21. CONFLICTING EVIDENCE—SUFFICIENCY OF QUALITY OF REJECTED PRUNES.—Where the evidence is conflicting as to whether the rejected prunes met the requirements of the contract as to quality, the verdict cannot be interfered with for that reason, notwithstanding the evidence seems to preponderate upon that point against the plaintiff. (Id.)

22. TESTIMONY OF PLAINTIFF—RESALE OF PRUNES—ACCEPTANCE BY PURCHASER AFTER EXAMINATION—RESTRICTION OF CROSS-EXAMINATION—ERROR.—After permitting plaintiff to testify that the rejected prunes were bought on resale for the Presto Fruit Company, after examination and acceptance by them, it was error for the court to restrict the right of cross-examination, by disallowing questions as to what was done with the prunes, and whether or not prunes could be used in the process employed by that company that would not be suitable for shipping in boxes. (Id.)

23. OBJECT OF PLAINTIFF'S EVIDENCE—LESSENING OF WEIGHT.—It being the clear object of plaintiff's testimony to show that the rejected prunes were merchantable, and complied with the contract, the weight of his evidence might have been materially affected, if on cross-examination it were shown that the prunes in question were used in a process not requiring choice fruit. (Id.)

24. ERRONEOUS INSTRUCTION AS TO INTEREST—CONSTRUCTION OF CODE. The court erred in instructing the jury as to interest on the amount found due on the rejected prunes from the date of their rejection, if found to be unjustifiable. The rule for damages in such case is laid down in sections 3311 and 3357 of the Civil Code, which must be taken together, and exclude the allowance of interest, and must govern as to that subject matter, to the exclusion of the general rule of interest in section 3187, which is in a different chapter. (Id.)

See Agency, 6.

SCHOOLS.

1. PETITION FOR WRIT OF MANDATE—REFUSAL OF SCHOOL TRUSTEES TO EXCLUDE UNVACCINATED CHILDREN — JUDGMENT UPON DEMURRER — REVIEW UPON APPEAL.—Upon a petition in the superior court by the state board of health to compel the board of trustees of the

SCHOOLS (Continued).

school district, defendant, to exclude unvaccinated children therefrom, which they had refused to do as required by the general vaccination act of February 20, 1889 (Stats. 1889, p. 23), where judgment was rendered for defendants upon demurrer to the petition, and directing a dismissal thereof, the petition must be taken as true for the purpose of decision upon appeal, and the judgment must be reversed with direction to overrule the demurrer thereto. (State Board of Health of State of California v. Board of Trustees of Watsonville School District, 514.)

2. **CONSTITUTIONALITY OF VACCINATION ACT—POLICE POWER FOR PUBLIC HEALTH—JUDGMENT OF LEGISLATURE.**—The general vaccination act of February 20, 1889, is constitutional. The legislature is necessarily the judge as to legislation under the police power for the public health, and to prevent the spread of contagious diseases, and provide the means used to prevent such spread and the diseases regarded as contagious. (Id.)
3. **LIMITATION UPON POWER OF COURTS.**—The discretion vested in the legislature within the scope of its power cannot be controlled by the courts, if not plainly abused. Its acts are the acts of the people, and if an act is oppressive or unjust, the remedy is with the people through the legislature. It is not for the courts to interfere, or in any way set up their judgment against that of the legislature as to general police powers of the state. (Id.)
4. **VACCINATION ACT MANDATORY.**—The general vaccination act is not directory, but mandatory, upon the trustees of all school districts and the boards of common school government in all cities and towns to exclude from the benefits of the common or public schools therein all unvaccinated children. (Id.)
5. **VACCINATION ACT NOT REPEALED BY COMPULSORY EDUCATION ACT.**—The vaccination act of 1889 is not repealed or affected by the compulsory education act of 1905 (Stats. 1905, p. 388). There is no inconsistency between these acts, and repeals by implication are not favored. While parents must send their children to school under the latter act, if they desire to send them to the common schools, they must comply with the former act, which continues to apply to all common or public schools, and is not in any way modified or superseded by the latter act. (Id.)
6. **PUBLIC SCHOOLS—VALIDITY OF UNION HIGH SCHOOL DISTRICT—MANDAMUS TO COUNTY SUPERINTENDENT—CERTIFICATE OF ELECTION—CALLING ELECTION OF TRUSTEES.**—Upon a petition for a writ of mandate to compel the county superintendent of schools to make and file a certificate of the result of an election held on the question of the formation of a union high school district, and to call an election of trustees therefor, the primary and vital question to be determined upon such petition is whether it shows upon its

SCHOOLS (Continued).

face that such union high school was legally or illegally established; and when it appears to be illegally established, the petitioners have no duty to perform, which is the subject of the writ, and the demurrer to the petition therefore was properly sustained. (Moorpark School District of Ventura County v. Reynolds, 170.)

7. **ILLEGAL FORMATION OF DISTRICT—BOUNDARIES ILLEGALLY DESIGNATED—ELECTION CALLED WITHOUT JURISDICTION.**—Where one of nine petitioning districts included in the boundaries of the alleged union high school district did not include in the petition therefor the majority of the heads of families therein as then required by law, and another of said districts included in said boundaries belonged to another union high school district, the boundaries of the union high school district were illegally designated, and the county superintendent of schools had no jurisdiction to call an election for its formation with such boundaries; and he cannot be compelled by *mandamus* to file a certificate of the result thereof. (Id.)
8. **NO DEFINITE LEGAL DESCRIPTION OF TERRITORY — ALTERNATIVE PETITIONS.**—Neither of such two districts being legally capable of uniting in a petition to form a union high school district, those who were lawful petitioners therefor failed to unite in any request for specific and definite legal territory to be included therein, where each of the nine petitioners requested that its own territory should be included either with six other districts or eight other districts. In such case it cannot be said that such requests unite upon any contiguous or compact legal territory, which could be lawfully united in a school district; but, on the contrary, there was a request for an election to unite with territory which could not lawfully enter into the district. (Id.)
9. **REQUEST FOR DEFINITE TERRITORY ESSENTIAL — AFFIRMATIVE AND NEGATIVE BALLOTS.**—The necessity for the definite character of the requests for the formation of a lawful school district is evident when the statute with reference to the election is considered, which provides that the electors shall vote "Yes" or "No" upon the question involved. (Id.)
10. **ALTERNATIVE PROPOSITION IN PETITION AND CALL NOT PERMISSIBLE.** The call for the election must be based upon the petition, and with an alternative proposition in the petition and call for the election, it would not be possible for the electors to express their assent to or dissent from the organization of a lawful district having particular and specified boundaries. (Id.)

SPECIFIC PERFORMANCE.

1. **ACTION TO REFORM AND SPECIFICALLY ENFORCE CONTRACT TO CONVEY LAND—INSUFFICIENT COMPLAINT—DEMURRER IMPROPERLY OVER-**

SPECIFIC PERFORMANCE (Continued).

RULED.—In an action in equity to reform and specifically enforce an alleged contract to convey land, where the complaint wholly omits to aver or show or to attempt to show that the consideration for which the defendant offered to sell the property involved in the contract is adequate or commensurate with the value of the property or that the contract is, as to the defendant, fair and just, as required by section 3391 of the Civil Code, it is insufficient as against a general demurrer, and a demurrer thereto was improperly overruled. (Martin v. Condrey, 618.)

- 2. SETTLED RULE OF EQUITY—FACTS STATED MUST SHOW ADEQUACY, FAIRNESS AND JUSTICE.**—It is a settled rule in equity that facts showing adequacy of consideration and, as to the party against whom the specific performance is sought, the justness and reasonableness of the contract, must not only be proved but must be also stated. This rule does not contemplate mere averments *in hoc verba* that the contract is supported by an adequate consideration, and is as to the defendant fair and just; but the conscience of the chancellor must be satisfied on these points by a proper statement of the facts. (Id.)
- 3. CONTRACT OF SALE—REAL ACTION—SERVICE OF SUMMONS BY PUBLICATION—JURISDICTION.**—An action to enforce specific performance of a contract for the sale of real property is one to determine a right or interest in real property, within section 412 of the Code of Civil Procedure, and the service of summons therein may be made by publication thereof, and such service is sufficient to give the court jurisdiction of the action. (Tutt v. Davis, 715.)
- 4. MOTION TO VACATE ORDER OF PUBLICATION—PROPER DENIAL.**—The court did not err in denying a motion of the defendant to vacate the order for publication of the summons in such action. (Id.)
- 5. EVIDENCE—MEMORANDUM OF CONTRACT—ASSIGNMENT—FAILURE TO RULE ON OBJECTIONS—EXTENT OF PREJUDICE—PROPER EVIDENCE—FINDINGS.**—The extent to which defendant was prejudiced by the failure of the court to rule upon his objections to the admission in evidence of the memorandum of the contract of sale, and the assignment of it to plaintiff, is measured by the injury which would result from their improper admission. It is a sufficient answer to such failure that they were properly admitted, and that the findings are conclusive that they were received and considered in evidence. (Id.)
- 6. MEMORANDUM A SUFFICIENT CONTRACT—SIGNATURE BY PARTY TO BE CHARGED—MUTUALITY—TENDER AND SUIT.**—The memorandum was a sufficient contract on which to base the action. It named both parties, fixed the terms of sale, and was signed by the party to be charged. Mutuality attached by the tender and subsequent suit. (Id.)

SPECIFIC PERFORMANCE (Continued).

7. **CERTAINTY OF CONTRACT—MODE OF SECURING DEFERRED PAYMENTS —VENDOR'S LIEN.**—The contract was not rendered uncertain from failure to specify a method of securing deferred payments. In the absence of specific agreement by which deferred payments and the interest thereon are to be secured in the sale of real property, the law fixes the security through a vendor's lien. (Id.)
8. **TIME FOR DEED—LAST PAYMENT TO BE MADE OR TENDERED.**—The law fixes the time for a deed in a contract for payment of the purchase money in installments, with interest on deferred payments when the last payment is made or tendered. (Id.)
9. **CONTRACT ASSIGNABLE BY PURCHASER.**—The interest of the purchaser named in the contract of sale is assignable, and the assignment passes all of the interest of the purchaser to the assignee. (Id.)
10. **PURCHASE BY PARTNERSHIP IN FIRM NAME —ESTOPPEL OF VENDOR.**—Where the defendant, as vendor, dealt with a partnership doing business by the firm name of the "Southern California Realty Co.," consisting of two partners, one of whom witnessed his signature to the contract, the defendant is not in a position to question the authority of the partnership to enter into the original contract sought to be specifically enforced. (Id.)
11. **REAL ESTATE FIRM—ASSETS DEEMED PERSONAL—AGENCY OF ONE PARTY TO ASSIGN IN FIRM NAME.**—The partnership being for the purpose of dealing in real estate, as between the partners, in the settlement of their equities, the assets of the firm must be regarded as personal property; and the agency of one of the partners is a sufficient authority to execute an assignment of the contract in the firm name. (Id.)
12. **TENDER OF FINAL PAYMENT—DEMAND FOR DEED—DEMAND FOR POSSESSION NOT REQUISITE.**—Where the final tender was made, no demand for possession was requisite. The demand for a deed, if complied with, would confer a right of possession without demand. (Id.)
13. **AGREEMENT NOT WITHDRAWN BY VENDOR —RETENTION OF MONEY PAID.**—No withdrawal from the agreement by the vendor based upon a tender of the money received thereunder is made to appear. One cannot be said to have withdrawn from an agreement by simply expressing a desire or intention to do so, while he retains the consideration paid him on account of its execution. (Id.)
14. **LACHES NOT IMPUTABLE TO PLAINTIFF.**—Laches cannot be imputed to plaintiff in bringing the action because of a delay of a little over three months after the cause of action arose before suit was brought, especially in view of the fact there is nothing in the record indicating any fluctuations in value between those dates. (Id.)

STATUTE OF FRAUDS.**1. CONTRACT TO SELL LAND—ESSENTIALS TO SPECIFIC PERFORMANCE.—**

The essentials to an enforceable contract to sell real estate are that it, or a memorandum or note of its terms, shall be in writing, and that such writing shall declare with certainty the party who sells, the party who buys, the price to be paid, and a description of the property sold by which it can be known or identified. (Baume v. Morse, 456.)

2. INSUFFICIENT MEMORANDUM—WANT OF PRICE AND DESCRIPTION.—

A mere dated receipt by defendant to plaintiff, for "forty dollars deposit on 5 acres of land in Compton. Good till the first of Nov. 1908," is incapable of specific performance, because no price is named therein, and the description given is not sufficient to justify a court of equity in enforcing the conveyance of any property. (Id.)

3. ABSENCE OF CAUSE OF ACTION FOR REVISION—CODE SECTION INAPPLICABLE.—

Where no cause of action for revision was stated in the complaint, the provision of section 3452 of the Civil Code that "a contract may be first revised and then specifically enforced" is inapplicable. (Id.)

4. MISSING TERMS OF CONTRACT NOT PROVABLE BY PAROL EVIDENCE.—

The offer by plaintiff to supply the missing terms of the contract by parol evidence, was properly denied by the court. (Id.)

5. WRITTEN TERMS OF AGREEMENT MUST CONTROL.—

When an agreement is reduced to writing, the writing is to be considered as containing all the terms of the contract; and no other evidence of the terms of the agreement will be admitted. No new terms can be introduced into the contract by parol. (Id.)

See Contract, 37.

STATUTE OF LIMITATIONS. See Findings; Leases, 8-10.

STOCK AND STOCKHOLDERS. See Corporations.

STREETS, ROADS AND HIGHWAYS.**1. PUBLIC ALLEY—CUL-DE-SAC—FULL BOUNDARY—TITLE DEEDS—TOWN**

PATENT—PUBLIC TRUST.—Where a public alley known as "Rose alley" formed a *cul-de-sac* about twelve feet wide, extending originally from Monterey street into block 13 of the city of San Luis Obispo, and terminated at the center of San Luis Obispo creek, and all of appellant's title deeds described it accordingly, and the testimony shows that it had been used both for watering stock and for delivering goods at a store bounding thereon, and that it was so used from 1862 to 1868, when the town patent was obtained, the trust for which the town trustees took the title therefor was to main-

STREETS, ROADS AND HIGHWAYS (Continued).

tain it throughout its entire length, as a public alley. (*Koshland v. Cherry*, 440.)

2. **OBSTRUCTION OF ALLEY BY STORE—GATE—LONG USER—PRESCRIPTIVE RIGHT NOT OBTAINABLE AGAINST CITY.**—Where in 1884 plaintiffs constructed a store on the alley and closed it by a gate, leading into the rear yard of their store, and used the property in that way for about twenty-three years before the city trustees and superintendent of streets ordered such gate to be removed and the ally opened to its full width, such long occupation could create no prescriptive right against the city. (*Id.*)
3. **USER NOT DEEMED ADVERSE TO PUBLIC RIGHT.**—Any user by plaintiffs or their predecessors in interest of a public alley could not be presumed to be adverse to the rights of the public. (*Id.*)
4. **ACCEPTANCE OF HIGHWAY BY USER—STANDARD—PURPOSE OF WAY.** In ascertaining whether or not a highway, public park or public place has been accepted by user, the purpose which the way, park, or place is fitted or intended to serve must be the standard by which to determine the extent and character of the use which constitutes an acceptance. (*Id.*)
5. **ACCEPTED HIGHWAY NOT DESTRUCTIBLE AS A GENERAL RULE—ABSENCE OF ESTOPPEL.**—A public highway cannot, as a general rule, be destroyed or acquired by adjacent private proprietors by adverse holding, where there is no element of estoppel which could bring the case within any exception thereto. (*Id.*)
6. **ACTION TO ENJOIN CITY AUTHORITIES FROM INTERFERENCE WITH GATE—JUDGMENT OF NONSUIT—AFFIRMANCE.**—In an action by plaintiffs to enjoin the city trustees and superintendent of streets from interference with plaintiffs' gate after twenty-four years' user thereof, it is held that a judgment of nonsuit was properly entered against the plaintiff, and that such judgment should be affirmed. (*Id.*)

See Eminent Domain, 15-21.

STREET ASSESSMENT.

1. **ACTION TO QUIET TITLE—PRIVATE LOTS PROJECTING INTO STREET—STREET IMPROVEMENT—CROSS-COMPLAINT TO FORECLOSE LIEN—FINDING—ERROR IN ASSESSMENT.**—In an action against street contractors to quiet title to private lots projecting ten feet into a street, and where defendants sought by cross-complaint to foreclose a street assessment thereon, in which the court found that the city had no right to such strip as part of the street, where it cannot be said the resolution of intention to improve the street passing said lot intended to exercise jurisdiction over private property, it follows that the contractors had no authority to construct a sidewalk across such strip, and that the superintendent of streets should not have ac-

STREET ASSESSMENT (Continued).

- cepted the work as completed, since the sidewalk was not constructed on and in front of said lots, and that he erred in so doing, and also in including the cost of constructing the sidewalk crossing the same in the assessment. (Oak Hill Water Co. v. Gillette, 605.)
2. **ERROR IN ASSESSMENT NOT AVOIDING LIEN.**—None of the acts of the contractors or of the superintendent of streets, nor any errors on his part in accepting the work as complete, and including improper cost of work in the assessment, can render the assessment and lien thereof void. (Id.)
 3. **REMEDY BY APPEAL TO CITY COUNCIL.**—Under section 11 of the street improvement act, the determination and acts of the street superintendent in relation to such errors is made the subject of an appeal to the city council by the owners or parties interested, upon the hearing of which the city council may confirm, amend, set aside, alter or correct the assessment in such manner as shall seem just, and may instruct the street superintendent to correct the warrant, assessment and diagram to conform to its decision. (Id.)
 4. **FAILURE OF PLAINTIFF TO APPEAL TO COUNCIL—PRESUMPTION—ORDER FORECLOSING LIEN AFFIRMED.**—Where the plaintiff, in the action to quiet title against the contractors, failed to appeal from the determination of the superintendent of streets, as to the completion of the work and from the erroneous levy of the assessment, it must be presumed that if he had done so the city council would have ordered the errors corrected; and the order of the court foreclosing the lien asserted by the contractors in their cross-complaint must be affirmed. (Id.)
 5. **FORECLOSURE—SUFFICIENCY OF COMPLAINT—SPECIFICATIONS IN CONTRACT NOT INCREASING CONTRACTOR'S LIABILITY.**—In an action to foreclose a street assessment, specifications in the contract pleaded that "the contractor will be required to observe all the ordinances of the board of trustees in relation to the obstruction of the streets, keeping open passageways and protecting the same where they are exposed and would be dangerous to public travel, and he will be held responsible for all damages the city may have to pay in consequence of his failure to protect the public from injury," impose no additional burdens upon the contractor, and do not affect the sufficiency of the complaint of the contractor to foreclose the assessment, and a demurrer thereto was improperly overruled. (Schindler v. Young, 18.)
 6. **NATURE OF PROVISION.**—Such provision, while having no proper place in the specifications, is clearly distinguishable from those which have been held invalid in increasing the burdens of the contractor. It does not contemplate any obligation devolving upon the contractor after the completion and acceptance of the work; and his obligations were not increased by requiring him to take measures under an ordinance applicable to all persons for the

STREET ASSESSMENT (Continued).

- protection of the public from dangers incident to exposed and unprotected obstructions in the highways. Nor could the city be liable to pay damages by reason of a defective street, nor by the contractor's neglect of duty in that respect, nor on account of his negligence in failing to observe the ordinances. (Id.)
7. **COST OF WORK NOT INCREASED TO DETRIMENT OF PROPERTY OWNER.** Such being the nature of the provision, no ground exists for presuming that by reason of such specifications, the cost of the work was increased to the detriment of the property owner. (Id.)
 8. **STREET IMPROVEMENT—DECREE FORECLOSING LIEN—APPEAL—ABSENCE OF EVIDENCE—UNTENABLE OBJECTIONS TO DESCRIPTION IN RESOLUTION—AFFIRMANCE.**—Upon appeal from a decree foreclosing the lien of a street assessment upon plaintiff's property for a street improvement under the Vrooman act, taken without a bill of exceptions or the evidence in any form, it is held that the objections of appellant to the insufficiency of the description of the work in the resolution of intention are without substantial merit, and that the judgment must be affirmed. (Burns v. Casey, 154.)
 9. **GENERAL RULE AS TO SPECIAL PROCEEDINGS IN INVITUM — STRICT CONSTRUCTION—STREET PROCEEDINGS—PRACTICAL ABSURDITY NOT REQUIRED.**—Although, as a general rule, special proceedings for the assessment and taxation of property for special purposes are in *invitum*, and must be strictly followed, yet the laws authorizing assessments for street improvements and other improvements necessary to the welfare of the community are not supposed to be so strictly construed as to render them practically nonsensical and nugatory. (Id.)
 10. **SUBSTANTIAL COMPLIANCE WITH STREET LAW—PROPER NOTICE.**—A substantial compliance with the provisions of the street law ought to be all that should be required, where property owners have been given such notice, in form required by law, of the proposed improvement as will put them in possession of fairly accurate knowledge of the character and extent of the work to be done, and of a reasonable approximation of the detailed and total cost of the improvement. (Id.)
 11. **FAILURE TO OBSERVE IMMATERIAL TECHNICAL REQUIREMENTS—ASSESSMENT NOT INVALIDATED.**—In such case, no assessment ought to be nullified, and the contractor forced to suffer a heavy loss, or perhaps made a bankrupt, merely because of the omission of the authorities to observe some immaterial technical requirements of the law authorizing the work. (Id.)
 12. **FOUNDATION FOR CURBS, GUTTERS, ETC.—SPECIFICATIONS—"TAMPING EARTH"—DISCRETION OF SUPERINTENDENT—"SELECTED EARTH"—"CRUSHED ROCK."**—A specification that the foundation for the curbs, gutters and round corners shall be laid by "tamping the earth" upon

STREET ASSESSMENT (Continued).

which they are to rest is clear and definite; but a discretion in the superintendent of streets to determine, as the result of digging, whether "selected earth material" or "crushed rock" shall be necessary is reasonable, and cannot invalidate the assessment. (Id.)

13. **ABSENCE OF EVIDENCE UPON APPEAL—DIFFERENCE IN COST NOT SHOWN.**—There being no evidence upon appeal as to the difference in the cost of obtaining "selected earth material" and "crushed rock," and such difference being a question of fact according to the circumstances under which either is obtainable, there is no basis upon which the judgment can be reversed on account of the discretion vested in the street superintendent. (Id.)

14. **QUESTION NOT PREDETERMINABLE BY CITY COUNCIL.**—The question whether the earth in which the foundations of the gutters, curbs and round corners are to be laid was naturally of sufficient compactness and strength to be suitable for that purpose, or whether "selected earth material" or "crushed rock" would be required, could not be determined by an inspection of the surface, and was not therefore subject to predetermination by the city council. (Id.)

15. **EVEN SURFACE OF STREET—USE OF "SUITABLE" EARTH MATERIAL.**—A specification requiring the contractor to bring the surface of the street to a smooth and even grade by the use of "suitable" earth material is not subject to just criticism by the use of the word "suitable." If that word were omitted, it would be implied in the obligation imposed upon the contractor, and it is not made less certain by inserting that word. (Id.)

16. **ALTERNATIVES IN MACADAM AND CONCRETE—MATERIALS FOR CRUSHED ROCK—QUESTION OF FACT—DIFFERENCE IN COST.**—There being nothing in the record to show any difference in the cost between the materials of cobbles, trap and basalt, out of which the macadam and concrete may be constructed, this court cannot take judicial notice of any difference in the cost of such materials, the only difference being a question of fact as to which might be more readily accessible or procurable than the others in sufficient quantity to do the work. (Id.)

17. **LOCATION OF CONCRETE CATCH-BASIN—DETERMINATION BY CITY SURVEYOR—COST NOT AFFECTED.**—The fact that the location of a concrete catch-basin to be constructed by the contractor was to be determined by the city surveyor is not material, where the construction of the catch-basin is minutely described, and it does not appear that its location at any particular point would increase or diminish the cost of its construction. (Id.)

18. **LINES AND LOCATIONS OF CURBS AND GUTTERS NOT SPECIFIED—MATTER OF COMMON KNOWLEDGE.**—The fact that the lines and locations of the curbs and gutters are not specified does not render them uncertain. It is matter of common knowledge that curbs

STREET ASSESSMENT (Continued).

must be placed at one of the edges of a street, and that they form the inner side of a gutter. (Id.)

19. **DISCRETION OF CONTRACTOR AS TO METHOD OF MIXING CEMENT—USE OF HAND OR MACHINE.**—Where the standard of concrete is the same, the discretion given to the contractor to construct it by hand or by machine simply gives him discretion as to the method of laying the concrete of that standard. (Id.)
20. **INVALID POWER CONFERRED UPON CITY SURVEYOR—POWER OF ADJUDICATION UNEXERCISED OR ATTEMPTED.**—The judicial power conferred upon the city surveyor to make a final adjudication of any misunderstanding or dispute as to the interpretation of the contract is invalid and void; but it is harmless where there was no attempt at the exercise of such power and no occasion arose calling for its exercise. (Id.)
21. **VALIDITY OF DISCRETION CONFERRED.**—The validity or invalidity of power or discretion conferred upon the county surveyor or the superintendent of public streets depends upon its nature. The giving of discretion to some person as to matters of detail in construction is inevitable in every street improvement, if no power is improperly delegated. (Id.)

See Remainder, 14, 15, 29.

SUMMONS. See Corporations, 17-21; Specific Performance, 3, 4.

SUPERIOR COURT. See Dentists, 1-3; Elections, 1; Justice's Court.

TAXATION.

1. **CITY TAXES—CITY ORDINANCE AUTHORIZED BY GENERAL LAW—ASSESSMENT AND COLLECTION—SALES TO STATE.**—Where by the general law of 1895 (Stats. 1895, p. 213), any city or municipal corporation, not of the first class, was authorized, by ordinance, to provide for the assessment and collection of its city taxes by the same methods employed by county officers, and by ordinance of the city of San Jose, it was so provided, all of its city taxes must thereafter be assessed and collected by the ordinary machinery employed for the assessment and collection of state and county taxes, including sales to the state, in case of delinquency for the city tax, as well as for the state and county taxes, and the passage of title to the state, in case of nonredemption thereof. (Griggs v. Hartzoke, 429.)
2. **DEED TO STATE—QUIETING TITLE—CROSS-COMPLAINT TO ENFORCE TAX TITLE—NONANSWER—ADMISSION OF LEVY OF CITY TAX.**—Where a deed had passed to the state for city, county, and state taxes, and the complaint was so framed as to cover the elements of an action of ejectment and to quiet title, and the defendant set

TAXATION (Continued).

up a tax title acquired from the state by way of cross-complaint under a deed for city, county and state taxes, to which no answer was filed, it cannot be objected by plaintiff that no city tax was levied for the year for which the sale was made, that fact alleged in the cross-complaint being admitted by failure to deny the same. (Id.)

3. **EFFECT OF RECITAL IN DEED TO STATE—PRIMA FACIE EVIDENCE.**—Where the deed to the state recited that a levy had been made for the city taxes, such recital, under the provisions of section 3186 of the Political Code, is *prima facie* evidence of its truth. (Id.)
4. **DEED FROM TAX COLLECTOR TO STATE'S GRANTEE.**—*Held*, that the deed of the state's title to the defendant by the tax collector was executed in the usual form, and that it was sufficient in form to divest the state's title and pass it to the grantee. (Id.)
5. **RECITALS REQUIRED—IMMATERIAL DISCREPANCY.**—Neither the total tax nor the amounts which go to make it up were required to be recited in the tax deed. It is the amount of the assessment which must be recited, both in the certificate of sale and tax deed, and it is sufficient that this is the same in both documents. A variance of a few cents in the recital of the tax levied for county purposes, between the certificate and the deed, is immaterial. (Id.)
6. **NOTICE OF SALE BY STATE—INCORRECT COMPUTATION OF INTEREST—FAILURE OF REDEMPTION—SALE NOT VOID.**—The mere fact that there was a mistaken computation of interest in the notice of sale by the state would not render the sale by the state void under the present law, under which the property belonged to the state, and it might sell it for a sum in excess of the amount of the tax, where the plaintiff failed to redeem and tender the amount due before the sale. (Id.)

See Criminal Law, 19; Protection District, 9; Quieting Title, 1, 5.

TRUST. See Remainder, 32.

UNDUE INFLUENCE. See Deed, 6-16.

VACCINATION. See Schools, 1-5.

VENDOR AND VENDEE.

1. **OPTION TO PURCHASE MINE—ACCEPTANCE—PART PAYMENT—DEED IN ESCROW—CESSATION OF OPTION—ENFORCEABLE CONTRACT.**—Under an option to purchase a mine upon specified terms, permitting the holders thereby to prospect the mine for the vendor's benefit during the option, upon the acceptance of the terms of purchase specified and payment of part of the purchase money, and procuring the deposit of a deed in escrow to be delivered upon full payment, and the

VENDOR AND VENDEE (Continued).

taking of full possession under the contract for the sole benefit of the purchasers, all option has fully ceased, and there is no continuing option as to deferred payments; but the vendor may enforce the residue of the purchase price, and upon full enforcement and payment thereof, the purchasers are entitled to the delivery of the deed placed in escrow. (Reed v. Hickey, 136.)

2. **EXECUTION OF CONTRACT BY VENDOR ALONE—PURCHASERS BOUND BY ACTS OF ACCEPTANCE.**—It does not follow because the plaintiff, as vendor alone, executed the contract that it is not binding upon the defendants as purchasers. The contract being an agreement to sell upon the exercise of the option to purchase, the acts of defendants in making payments and taking full possession under the contract constituted a sufficient acceptance of its terms, and defendants became bound by it. The further signing of a supplemental agreement by an agent for the defendants evidenced a further acceptance of the contract by the defendants. (Id.)
3. **MUTUALITY OF REMEDY NOT REQUIRED.**—Mutuality of contract does not require that there should be mutuality of remedies under it. Defendants could not by their depriving themselves by this breach of contract of the right to enforce a specific performance thereof deprive plaintiff, who had not broken the contract, of his right to enforce payment of the purchase money in full. (Id.)
4. **REMEDY TO REPOSSESS MINE NOT EXCLUSIVE.**—The plaintiff was not confined to his remedy of repossessing the mine, upon defendants' breach, and after defendants have extracted a large quantity of gold from it to its possible exhaustion. (Id.)
5. **CONTRACT TO SELL LAND—USE OF WORD "SOLD"—DEPOSIT—POSSESSION OF PURCHASER—DEED IN ESCROW—NONPAYMENT—AGREED CANCELLATION.**—The use of the word "sold" in a contract for the purchase and sale of real estate does not conclusively show a present conveyance; and where the purchaser merely made a deposit of money with an agreement to pay the residue of the price, and was allowed to take possession, and a deed was placed in escrow, to be delivered only when the full price was paid, which the purchaser failed to pay, and the whole transaction was canceled by mutual agreement, and the deed returned to the vendor, and the deposit to the purchaser, the contract, together with the conduct of the parties, can be construed only as an agreement of sale, and not a conveyance, and the title never passed to the purchaser. (Estate of Goetz, 198.)
6. **TITLE UNDER WILL OF DECEASED VENDOR—CONTRACT OF SALE NOT AN EQUITABLE CONVERSION—CANCELLATION DURING LIFE OF VENDOR.**—The contract of sale cannot be deemed an equitable conversion of the land sold into money, so that the title thereto cannot pass under the will of the deceased vendor, where the cancellation

VENDOR AND VENDEE (Continued).

of the contract was fully effected by agreement of the parties thereto during the life of the vendor. (Id.)

7. **EQUITABLE CONVERSION PRECLUDED BY CIVIL CODE—EFFECT OF WILL—REMEDIES OF PURCHASER.**—The doctrine of equitable conversion is precluded by the terms of section 1301 of the Civil Code, providing that "an agreement made by a testator for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors if the same had passed by succession." (Id.)

See Specific Performance; Statute of Frauds.

VENDOR'S LIEN. See Specific Performance, 7.

WATER AND WATER RIGHTS.

1. **WATER RIGHTS—INTERFERENCE WITH DITCH—MANDATORY INJUNCTION—PRESCRIPTIVE TITLE OF PLAINTIFFS—SUPPORT OF FINDING AND JUDGMENT.**—In an action by plaintiffs to obtain a mandatory injunction requiring defendants to remove all obstructions to the flow of sixty cubic inches of water per second of the waters of a stream in controversy into the ditch of the plaintiffs for use on their lands, it is held, upon a review of the evidence, that it supports a finding that plaintiffs and their predecessors had acquired a prescriptive title to that quantity of water as against the defendants, by adverse user for the requisite period, and that such finding is pivotal to the judgment awarding the relief sought, which cannot be disturbed. (Evans Ditch Co. v. Lakeside Ditch Co., 119.)
2. **EFFECT OF STIPULATION AS TO PLAINTIFFS' LONG USER—PROOF OF ADVERSE USER.**—A stipulation made for the purpose of trial, the language of which is unmistakable as to the use by plaintiffs and their predecessors of the quantity of water claimed for twenty years, leaves only the proof that such stipulated user was adverse, under a claim of right, and hostile to the interests of the defendants. *Held*, that the evidence warrants the rational inference that such stipulated user was open, notorious, and under a claim of right, and therefore adverse. (Id.)
3. **ACQUIESCENCE OF DEFENDANTS.**—The court below from this long-continued use might have presumed the knowledge and acquiescence of defendants; but it had also the direct statements of witnesses clearly revealing such knowledge and acquiescence. (Id.)
4. **QUESTIONS OF FACT—ADVERSE USER—IMPLIED LICENSE.**—The questions whether or not the user was adverse or was with the

WATER AND WATER RIGHTS (Continued).

implied license of the defendants were questions of fact to be determined by the court in the light of the surrounding circumstances. (Id.)

5. **MEANS OF DIVERSION IMMATERIAL — ARTIFICIAL AND NATURAL CHANNEL.**—The result as to adverse user is not affected by the circumstance that the diversion was by means both of an artificial and a natural channel, such as by a ditch and slough used by plaintiffs in the present case to divert the water to use on their land; and an appropriation so made will be as effectual as if it was carried through a ditch or pipe made for that purpose and no other. (Id.)
6. **ABSENCE OF DISTINCTION AS TO PRESCRIPTIVE RIGHT OR APPROPRIATION.**—So far as respects the use both of an artificial and natural channel, there is no difference between the appropriation of water under a claim of right and for the requisite time to ripen into a title by prescription, and the case of an appropriation specifically provided for in sections 4115–4122 of the Civil Code. (Id.)
7. **USE OF WATER FOR BENEFIT OF PLAINTIFFS—SUFFICIENCY OF EVIDENCE.**—*Held*, that the court was entirely justified in concluding from the evidence that the diversion of the water and its use was for the benefit of the plaintiffs; and that they being in possession when the defendants obstructed the flow of the water are presumed to be the owners thereof in the absence of a showing by defendants to the contrary, and that the water right followed the ownership of the ditch in the plaintiffs. (Id.)
8. **EVIDENCE OF PRIOR APPROPRIATION—LOW WATER IN STREAM.**—Evidence showing that when the water was low in the stream diverted at the point of diversion of plaintiffs, it would not reach the ditch of defendants by seepage or otherwise, and could not be used by them, would establish that the plaintiffs were prior appropriators, and that the defendants were trespassers in interfering therewith. (Id.)
9. **EVIDENCE AS TO AMOUNT OF WATER APPROPRIATED — ADMISSION WITHOUT OBJECTION.**—Where evidence as to the amount of water appropriated was admitted without objection, it cannot be said that the trial court was not justified in acting upon it. The estimate of such amount by a hydraulic engineer seems the best available, in the absence of contrary evidence. (Id.)
10. **QUALIFICATION OF EXPERT WITNESS AS MEASURER OF WATER—DISCRETION OF COURT.**—In determining the qualification of an expert witness as a measurer of water, the trial court has quite a wide discretion, and it cannot be said that it was abused in determining that he was not qualified and in striking out an answer made by such witness, which would not assist the court in determining the quantity of water to which respondents were entitled. (Id.)

WATER AND WATER RIGHTS (Continued).

11. **EVIDENCE OF CLAIM OF RIGHT BY PLAINTIFFS.**—Evidence was admissible to show, in aid of plaintiff's prescriptive title, declarations made by them asserting their claim of right to use the water. (Id.)
12. **ABSENCE OF PREJUDICIAL RULINGS.**—It is held that the court made no prejudicial rulings upon evidence calling for a reversal of the case. (Id.)
See Eminent Domain, 27-37.

WILLS.

1. **PROBATE OF DESTROYED WILL—FINDING AS TO PROOF OF CONTENTS UNSUPPORTED.**—Where a will destroyed in the great conflagration in San Francisco was admitted to probate under section 1339 of the Code of Civil Procedure, the necessary finding that the contents of the will were proved by two credible witnesses was unsupported, where the only credible witness was one who drew the will and knew its contents, and was qualified to prove them by parol, and the only other witness to its contents was that of one who had never seen or read the will, but had merely heard it or a copy of it read to her by the one who drew the will. (Estate of Guinasso, 518.)
2. **CONSTRUCTION OF STATUTE—INTENTION OF LEGISLATURE.**—The legislature intended when it enacted the requirement that two credible witnesses must be produced to prove the contents of a destroyed will, that each of them must give primary evidence, or evidence from personal knowledge as to the contents of the will, and it never contemplated that one of such witnesses might in effect multiply himself into any number of witnesses by reading a will, or stating its contents to other persons. (Id.)
3. **CONTENTS OF WRITING NOT PROVABLE BY HEARER.**—The contents of a writing cannot be proved by the testimony of a person who heard the writing read. (Id.)
4. **EFFECT OF STIPULATION UPON APPEAL—DUE EXECUTION OF WILL—WAIVER OF FINDING—PROOF OF CONTENTS NOT INVOLVED.**—A stipulation upon appeal that "the will of said deceased was proved to have been duly executed by him before two attesting witnesses," and waiving the assignment of insufficiency of the evidence to prove the same, has no bearing upon the assignment of insufficiency of the evidence to sustain the finding as to proof of the contents of the will. Proof of the provisions of a destroyed will is quite a different matter from proof of its due execution before two attesting witnesses. (Id.)
5. **CONSTRUCTION—MONEY LEGACIES—EXCLUSION OF SPECIFIC DEVISEES AND LEGATEES—PRO RATA SHARE IN SURPLUS MONEY.**—Under a will distributing \$180,000 in money legacies, and expressly excluding any share therein by specific devisees and legatees of all

WILLS (Continued).

the testator's land, pictures, jewelry and furniture, declaring that he made "no money bequests" to them, as the real estate "so bequeathed to them in equal shares is ample and sufficient"; but in a final bequest of any possible "surplus money that may be left, the will states that it" shall be divided equally among "the legatees herein mentioned, share and share alike," the specific devisees and legatees are entitled to share *pro rata* in such surplus. (Estate of Goetz, 266.)

6. INTENTION OF TESTATOR DRAFTING OWN WILL—UNTECHNICAL TERMS—POSSIBLE REDUCTION OF LEGACIES—SURPLUS UNANTICIPATED—CLOSER TIES.—Where the testator was of foreign birth with limited knowledge of technical terms in English, and drew his own will, it seems evident from its terms that he thought the bequests of \$180,000 might more than exhaust his money, since he provided for a reduction of legacies if the money was found insufficient, and did not anticipate a surplus which he provided for out of abundance of caution, using the words "if there should be some surplus of money" it shall be divided as expressed, and since those to whom the land and all equipments were bequeathed were in closer ties to him than the money legatees, it seems evident from all the language used that it was merely his intention to exclude them from a share in the specified money legacies, and not from a share in any part of the surplus. (Id.)
7. INTERPRETATION OF REPEATED WORDS IN WILL.—Words occurring more than once in a will are presumed to be used in the same sense; and the allusion to "money bequests" in the clause limiting the bequests of land are evidently used in the same sense as that of the preceding "money bequests" referred to. (Id.)
8. DOUBTFUL INTENTION TO QUALIFY RESIDUARY CLAUSE—CLEAR AND DISTINCT BEQUEST OF SURPLUS—CODE PROVISION.—It being at least doubtful whether the testator intended by the qualification of the land bequest to limit or affect the residuary clause disposing specifically of any possible surplus, it is sufficient to sustain the specific residuary clause that section 1322 of the Civil Code provides that "a clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will or by an inaccurate recital of or reference to its contents in another part of the will." (Id.)
9. CONSTRUCTION AND EFFECT—LAPSED LEGACY—PART OF RESIDUE—STATUTE OF DESCENT INAPPLICABLE.—Where it satisfactorily appears from the terms of a will that the testator intended that in case of legatees who should die prior to his death the legacies bequeathed to them should lapse and become part of the residue of his estate, the terms of the will must control in that respect, and the provision of section 1310 of the Civil Code, that

WILLS (Continued).

when a devisee or legatee who is a relation of the testator dies before his death, leaving lineal descendants, such descendants shall take the same share which would have passed to the devisee or legatee had he survived the testator, is inapplicable, in such case. (Estate of Goetz, 292.)

10. **INTENTION OF TESTATOR—UNTECHNICAL TERMS EMPLOYED IN SELF-DRAWN WILL.**—It is sufficient that the intention of the testator as to the disposition of lapsed legacies can be readily ascertained, notwithstanding the use of inartificial terms in expressing his intention in a will drawn by the testator himself, who is a foreigner by birth, unable to express himself with technical accuracy. In order to learn his intention, the whole will may be examined, and words may be interpolated or transposed, and the use of technical words incorrectly will be taken as if correctly used. (Id.)
11. **USE OF WORDS "DEVISE" AND "BEQUEATH"—MISUSE OF WORDS.**—The words "devise," "bequeath" and corresponding terms are frequently employed interchangeably, especially by testators who are not lawyers and who draw their own wills. Some words are so frequently misused by testators that very little argument is needed to move the court to reject them and substitute others in their place. The will in question uses the words "legacy or bequest" to include a devise, and the word "devise" to include a "legacy," and the word "devise" with sense of "devisee." (Id.)
12. **CORRECTION OF INACCURATE CONTINGENT CLAUSE AS TO LAPSED LEGACIES.**—A clause in the will reading: "And devise so bequeathed by me should die prior to my death the legacies to them mentioned in this will shall lapse, and such legacies shall form part of my residuary estate," evidently refers to a contingent event, and the word "If" should be inserted at the beginning of the clause, and the words "and devise," changed to "any devisee." In view of the law applicable to lapsed legacies, and the whole language of the will, the testator evidently intended that legacies lapsing by the prior death of legatees should include all legacies mentioned in the will. (Id.)
13. **CODE PROVISION AS TO CONSTRUCTION OF WILL—"CLEAR AND DISTINCT BEQUEST"—INAPPLICABILITY TO CHILDREN NOT REFERRED TO.** Section 1322 of the Civil Code provides a rule applicable only to the construction of a will, where a clear and distinct devise or bequest is sought to be affected by a provision of the will not equally clear and distinct; and that section can have no application to children of a deceased legatee whose legacy has lapsed as provided in the will, and has become part of the residue of the estate, if such children are in no wise referred to or provided for as beneficiaries under the will. That section does not provide that when one may be entitled to a legacy by force of the statute, any in-

WILLS (Continued).

tention of the testator to prevent the operation of the statute must be as clear and distinct as the statute itself. (Id.)

14. **STATUTE OF DESCENT IN CASES OF LAPSED LEGACIES NO PART OF WILL—APPLICABILITY.**—The statute of descent in cases of lapsed legacies, embodied in section 1310 of the Civil Code, is no part of the will itself, and cannot be affected by section 1322 of the Civil Code. The statute of descent can only apply where there is no intention to the contrary expressed by the testator in his will. (Id.)
15. **PARTIAL DISTRIBUTION UNDER WILL PROPERLY REFUSED.**—A petition for partial distribution under the will in behalf of children of a deceased legatee, whose legacy has lapsed and become part of the residue of the estate, under the terms of the will, was properly refused, and the order refusing it must be affirmed upon appeal. (Id.)
16. **CONTEST OF PROBATE — MENTAL UNSOUNDNESS OF TESTATOR—INSANE DELUSION AS TO FACTS RESPECTING CHILDREN.**—If a testator, against all evidence and probability, believed supposed facts respecting his children, which had no existence except in his perverted imagination, and conducted himself, however logically, upon the assumption of their existence, he is, so far as such facts are concerned, under an insane delusion; and if he was the victim of such a delusion when he executed his will cutting off his children with one dollar each, and if the provisions of the will were caused by such delusion, the instrument is not his will, and its probate may be contested by such children for the mental unsoundness of the testator. (Estate of Riordan, 313.)
17. **INSANE DELUSION NOT PROVED — VERDICT OF UNSOUND MIND AGAINST EVIDENCE.**—Where no witnesses other than the interested children assailed the testamentary capacity of their father, and twenty disinterested witnesses intimately acquainted with him testified to his mental soundness, and the evidence of the children was mainly addressed to his harsh and cruel treatment of them and of their mother prior to her divorce from him twenty-two years before his death, wherein he settled upon her the greater portion of his property, and the children sided with their mother, and for many years prior to their father's death had no relations with him and avoided and refused to speak to him, and there is no evidence tending to show an insane delusion respecting them, and it was proved that his will was his voluntary and intelligent act, a verdict that he was of unsound mind when it was executed is against the evidence. (Id.)
18. **BAD TEMPER NO PROOF OF INSANE DELUSION.**—A person may have a bad temper, and under its influence may say and do wrong and unnatural things, and still not be laboring under an insane delusion as to the objects of his hostility. (Id.)

WILLS (Continued).

19. **PREJUDICES, ANTIPATHIES AND DISLIKES NOT DESTROYING TESTAMENTARY POWER.**—Prejudices, antipathies, and dislikes, however ill-founded or however strongly entertained, cannot be classed as an insane delusion. People may hate their relations for bad reasons, and yet not be deprived of testamentary power. (Id.)
20. **BELIEF AGAINST CHILDREN NOT WITHOUT REASON.**—Whatever belief or opinion the testator entertained toward his children when the will was made, the record does not show there was no reason therefor, or that he adhered to it against all evidence and argument. If the deceased had, after the divorce was granted to the wife, who obtained the largest part of the property, made a will disinheriting the children who sided with their mother, as to the residue of his property, it could not be said to be without reason, and in view of their subsequent course of conduct, his last will, so far from being the result of insanity, was a very natural thing to do. (Id.)
21. **BELIEF NOT UNCHANGEABLE FOR PROPER REASON.**—It does not appear that he could not have been reasoned out of his belief, upon a changed course of conduct of his children. Where the testator's belief is not so fixed that he could be reasoned out of it, it will not be held to be a delusion. (Id.)
22. **RESIDENCE WITH NEPHEW — ABSENCE OF UNDUE INFLUENCE.**—Where, for many years, the testator had resided with a nephew, and had, without suggestion, showed a strong disposition to leave the bulk of his estate to his nephew and his son, and his last will was made six years before his death, and when he was in robust health, and was made without suggestion from anyone, as his voluntary act, free from any suspicious circumstances, and the persons named were the natural objects of his bounty, a verdict that the will was procured by the undue influence of the nephew is against the evidence. (Id.)

WRIT OF REVIEW. See *Certiorari*.

